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No. .....

In The

Supreme Court of the United States

October Term, 1986

YANKTON SIOUX TRIBE OF INDIANS,

Petitioner,

v.

STATE OF SOUTH DAKOTA,
CHARLES MIX COUNTY, SOUTH DAKOTA,
AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States' acquisition of the Louisiana Territory in 1803 precluded the Yankton Sioux Tribe from subsequently perfecting aboriginal title, despite lengthy and exclusive tribal occupancy, to a navigable lake later included in the reservation.

Whether the rule of *Montana v. United States,* 450 U.S. 544 (1981), that tribal title to navigable beds requires a conveyance of such beds from the United States to the tribe, forecloses the Yankton Sioux Tribe's claim to aboriginal title to a navigable lake.

Whether the United States by the Treaty of April 19, 1858, 11 Stat. 743, granted the Yankton Sioux Tribe recognized title to a navigable lake located wholly within the Yankton Sioux Reservation.

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The petitioner Yankton Sioux Tribe of Indians respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 22, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 796 F.2d 241, and is reprinted in the appendix hereto, App. 1, *infra.*

The memorandum decision of the United States District Court of the District of South Dakota is reported at 604 F.Supp. 1146, and is reprinted in the appendix hereto, App. 9, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. sections 1331, 1362 and 2201, petitioner Yankton Sioux Tribe brought this action in the District of South Dakota. On March 21, 1985, the district court entered summary judgment for petitioner. *See* App. 9, *infra*.

On respondents' appeals, the Eighth Circuit on July 22, 1986, entered a judgment and opinion reversing the district court. *See* App. 1, *infra*. On August 4, petitioner filed its petition for rehearing with a suggestion for *en banc* review. The Eighth Circuit requested the respondents to respond to the petition. On November 7, 1986, the petition for rehearing was denied; two judges would have granted the petition. *See* App. 34, *infra*.

On January 29, 1987, Justice Blackmum granted an application for extension of time for filing this petition for certiorari up to and including March 9, 1987.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. section 1254(1).

TREATY INVOLVED

The Treaty of April 19, 1858, 11 Stat. 743, is reprinted in the appendix hereto, App. 35, *infra*.

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STATEMENT OF THE CASE

This litigation was commenced in 1976 by the Yankton Sioux Tribe of Indians of South Dakota. It is a dispute over the ownership of Lake Andes, a navigable lake covering approximately 4,000 acres and located wholly within the exterior boundaries of the Yankton Reservation. The original defendants in the suit were private individuals who had entered the lakebed, then dry and covered with a wild crop suitable for cattle feed, under permission of the State of South Dakota. The State of South Dakota and Charles Mix County intervened as defendants early in the litigation and the original defendants were dismissed from the suit by stipulation.

The Tribe claims title to the lake by virtue of its aboriginal use and occupancy of the lake and the Treaty of April 19, 1858, 11 Stat. 743. The State claims title to the lake by operation of the equal footing doctrine and the Cession Agreement of 1892, 28 Stat. 314. Both the Tribe and the State asserted their claims on cross motions for summary judgment in the district court. While those motions were pending, this Court announced its decision in *Montana v. United States*, 450 U.S. 544 (1981). In a supplemental memorandum in support of its motion for summary judgment, the Tribe distinguished the *Montana* decision on two bases: 1). the Yankton's aboriginal use of and title to Lake

Andes, and 2). the language of the Treaty of 1858 confirming the Yankton's pre-existing title. The district court granted the Tribe's motion for summary judgment. 521 F.Supp. 463.

The State and County appealed to the Eighth Circuit Court of Appeals. In 1982, the court of appeals reversed and remanded the case to the district court for an explicit finding on the navigability issue. The court of appeals expressed no view on the merits of the competing claims to ownership at that time. 683 F.2d 1160.

On remand, the district court entered an order finding Lake Andes navigable on the relevant dates and decreeing the Tribe the owner of Lake Andes. 566 F.Supp. 1507. The United States moved to intervene in the action on September 1, 1983, while timely motions to amend the judgment were pending.[1] The United States supported the State's claim to title under the equal footing doctrine and argued, in the alternative, that the United States acquired title to the bed unencumbered by any trust for the Tribe by the Cession Agreement of 1892. The district court granted the United States' motion to intervene and the Tribe moved for summary judgment. The Tribe again argued its aboriginal use of the lake and confirmation of its title to the bed in the Treaty of 1858. The district court again granted the Tribe's motion for summary judgment. 604 F.Supp. 1146.

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[1]The State had granted a perpetual easement over the lake to the United States by quit claim deed in 1939 for the operation and maintenance of a wildlife refuge. Since that time, the United States Fish and Wildlife Service has managed the Lake Andes Wildlife Refuge on and adjacent to the lake.

On Appeal to the Eighth Circuit, the parties focused principally on the differences and similarities between *Montana v. United States, supra,* and this case. As it had in the district court, the Tribe argued its aboriginal title and the treaty confirmation thereof as the principal distinctions from *Montana.* The State and County disputed the Tribe's aboriginal title to the lake—not for failure to demonstrate aboriginal use and occupancy, but for failure to show that aboriginal title had attached before the United States acquired sovereign title in 1803.[2] The United States did not make this argument in its appellate brief. However, the Eighth Circuit adopted the position argued by the State on the aboriginal title issue and reversed on that basis.[3]

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[2]It is undisputed by the parties that exclusive Yankton use and occupancy of Lake Andes and environs commenced around 1800. The United States acquired sovereign title to the area in 1803 before the Tribe's use of the area had ripened into aboriginal title. By the time the Tribe first treatied with the United States in 1858, however, the Tribe had been in exclusive possession of the area for a sufficient period of time to give rise to aboriginal title. *See* Yankton Sioux Tribe v. United States, 24 Ind. Cl. Comm. 208.

[3]The Court of Appeals did not reach the Tribe's treaty based claim. Even though the Tribe had argued that it received recognized title to Lake Andes in the Treaty of 1858 (*see* Appellee's Brief, pp. 14-15), the Court of Appeals erroneously determined that the Tribe did not claim an conveyance of the bed from the United States to it. *See* App. 7, *infra.* Thus, the reversal turned solely on the aboriginal title issue.

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit's Decision Is Inconsistent With Decisions Of This Court And Other Lower Federal Courts On A Significant Point Of Federal Indian Law.

The Eighth Circuit held that once the United States' sovereign title attaches to a navigable bed a tribe loses all opportunity to acquire aboriginal title to the same navigable bed. The relationship of sovereign title to aboriginal title has been the subject of a number of decisions by this and other courts. The Eighth Circuit's holding is inconsistent with the reasoning and results of those cases.

Since the earliest years of the Republic this Court has recognized that aboriginal title and sovereign title are distinct. Aboriginal title arises from a tribe's exclusive use and occupancy of certain lands. *Oneida v. Oneida Indian Nation,* 470 U.S. —, 84 L.Ed.2d 169 (1985); *Mitchell v. United States,* 34 U.S. (9 Pet.) 711 (1835); *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543 (1823). Aboriginal title is determined by reference to the particular tribe's "habits and modes of life," and thus extends to land and resources thereon exclusively used and occupied. *Mitchell, supra* at 746; *see also United States v. Cook,* 86 U.S. 591 (1874); *Cohen Handbook of Federal Indian Law* 490-91 (1982 ed.). Sovereign title, on the other hand, is not a possessory interest in land. Sovereign title arises from the "discovery" of the territory by a European nation and primarily defines the discovering sovereign's rights vis-a-vis other European nations, *i.e.* it excludes all other European powers from the discovered territory. But sovereign title does not become possessory unless and until aboriginal rights in the same territory are extinguished. *Johnson v. McIntosh, supra* at 573.

Thus, this Court has long treated sovereign and aboriginal title as different yet compatible. Both titles can exist simultaneously in the same land. One form of title can also be conveyed without affecting the other. *Buttz v. Northern Pacific Railroad,* 119 U.S. 55, 56 (1886); *Beecher v. Wetherby,* 95 U.S. 517, 525 (1877); *Fellows v. Blacksmith,* 60 U.S. (19 How.) 366 (1857); *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810).

Based on these Supreme Court opinions, the Court of Claims has determined that aboriginal title can arise in an area after the United States has acquired sovereign title to the territory. See *Turtle Mountain Band of Chippewa Indians v. United States,* 490 F.2d 935 (Ct.Cl. 1974). The Turtle Mountain Band, like the Yankton Tribe and others, moved into the Louisiana Territory too late for aboriginal title to ripen before 1803. Yet, the Court of Claims held that fact immaterial:

> We see no reason to limit or ignore the long series of cases, stretching back to *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823), which have created and maintained this separation [between sovereign and aboriginal title.][4]

The Ninth Circuit has also upheld aboriginal claims to navigable beds under similar circumstances. *See United*

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[4]The Court of Claims explicitly held in *Turtle Mountain* that aboriginal title can rise after the United States acquires sovereign title, but did not address separately the question of aboriginal title to navigable beds. On remand, the Indian Claims Commission did specifically hold that the Turtle Mountain Band's aboriginal title extended to certain navigable beds. *See* Turtle Mountain Band of Chippewa Indians v. United States, 43 Ind. Cl. Comm. 251, 255-56.

States v. Romaine, 255 F. 253 (9th Cir. 1919); *Heckman v. Sutter*, 119 Fed. 83, 88 (9th Cir. 1902).[5]

Notwithstanding these precedents, the Eighth Circuit held that aboriginal title to navigable beds cannot attach after the United States acquires sovereign title to the bed. The Eighth Circuit did so without serious analysis of any of the decisions cited above.

The ancient doctrine of aboriginal title is a cornerstone of federal Indian law, one of the fundamental protections of native peoples long recognized by the United States and other nations. Consistency among the federal circuits in the development and application of that doctrine is an important concern. Because of the Eighth Circuit's significant departure from precedents of this and other courts, the Eighth Circuit's decision should be reviewed by this Court.

2. This Case Is Of Great Practical Importance For The Yankton Sioux Tribe And Other Tribes Located In The Louisiana Territory.

This case involves title to Lake Andes, the single most important resource, both historically and in modern times, located within the Yankton Sioux Reservation. Long before the Yankton Reservation was set aside by treaty in

[5]In *Romaine*, the Ninth Circuit recognized aboriginal title to tidelands, but did not inquire whether the Lummi Tribe's title to those lands ripened before the United States acquired sovereign title to them. In *Heckman*, the parties again did not raise the issue of whether aboriginal title attached to the tidelands in question there before the United States acquired the territory. But in fact the tribe's aboriginal title was acknowledged by the court as of 1884 long after the United States acquired the territory in 1867. *See* Heckman v. Sutter, 128 Fed. 393 (9th Cir. 1904), *on rehearing*.

1858, the Yankton Tribe had exclusively used Lake Andes and the surrounding area.[6] Lake Andes and environs were "highly significant" to the Yankton people as a source of food such as wild game, waterfowl, fish, and wild plant foods, and of wood and plant fibers used for other purposes. J. App. 7, p. 5, reprinted in the appendix at 56, *infra.* Lake Andes was known by the Yanktons as Pte ta tiyopa, or Buffalo's Gateway, and was occupied according to Yankton legend by a large underwater panther called Unktehi. This particular Yankton legend regarding Lake Andes dates back to 1700. J. App. 14, reprinted in the appendix at App. 65, *infra.* Thus, the Yanktons had been long familiar with Lake Andes and had exclusively occupied the lake and surrounding area for a sufficient period of time to give rise to aboriginal title before the Treaty of 1858. *See Yankton Sioux Tribe v. United States,* 24 Ind. Cl. Comm. 208.

After the Treaty of 1858, Lake Andes became an even more vital food source for the Yankton people. The treaty confined the Yanktons in their subsistence activities to the 400,000 acre reservation. Buffalo, the single most important food for the Yankton, disappeared by 1870. Rations promised the Yanktons in the Treaty of 1858 were often late and, on occasion, not delivered at all. During these times, water-based plant and wildlife, particularly those of Lake Andes, were the only foods naturally occurring on the Reservation. *See* App. 65, *infra.*

That the Yanktons continued to rely on Lake Andes into the twentieth century is evidenced by acts of Congress.

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[6]The parties here agree that the first recorded contact with the Yankton Sioux in South Dakota occurred in 1794. *See* J. App. 204, reprinted here in the appendix. In the Appendix at App. 49, *infra.*

See 29 Stat. 343, where Congress directed the Secretary of the Interior to sink artesian wells "at or near Lake Andes on the Yankton Sioux Reservation . . . for the purpose of supplying said Indians with water for domestic purposes, for stock, and for irrigation purposes."; 34 Stat. 371, where Congress appropriated an additional five thousand dollars for the same purpose; 42 Stat. 990, where Congress directed the Commissioner of Indian Affairs to construct a spillway at Lake Andes. Today Lake Andes is renowned in and out of South Dakota for its sport fishing and duck hunting. The Yankton Tribe has also been investigating the potential for irrigated farming of one part of the lakebed that is often dry. Thus, the lake has real potential as the most important economic resource for an impoverished and land poor tribe. But as a result of the Eighth Circuit's decision, the opportunity for continued productive use of this important resource was lost to the Tribe.

The impact of the Eighth Circuit's decision does not stop at the boundaries of Lake Andes. The Eighth Circuit did not reject the Yankton's aboriginal title on a factual weakness of the claim. Rather, the Eighth Circuit held as a matter of law that unless a tribe's aboriginal occupancy of navigable waters had ripened into aboriginal title by 1803, the United States' purchase of the territory in that year forever cut off any tribal rights to those waters.

It so happens that many tribes now on reservations in the Louisiana Territory settled there relatively late in history. *See, e.g., Sioux Nation, et al. v. United States,* 23 Ind. Cl. Comm. 428, where the Commission chronicles the arrival of all the Sioux tribes into the Dakotas in the late eighteeth century. Given the scarcity of fish supporting streams and lakes in the plains, such bodies of water in a tribe's terri-

tory would be an important resource for the tribe, just as Lake Andes has been for the Yankton people. But claims for aboriginal title to such waters within their reservations by late-arriving tribes are now seriously impaired.[7]

Clearly, the Eighth Circuit's decision is of great importance to the Yankton Sioux Tribe and many of the approximately 20 tribes in the Louisiana Territory. Because of the number of tribes affected by it and the value of navigable waters to those tribes, the Eighth Circuit's decision should be reviewed by this Court.[8]

3. This Case Presents A Recurring Issue Left Open By This Court In Montana v. United States.

In *Montana v. United States*, 450 U.S. 544 (1981), this Court held that the Crow Tribe did not own that part of the navigable Big Horn River that flows through the Crow Reservation. There, the case for tribal ownership was argued on the basis of treaty granted rights, the

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[7]Coincidentally, the Eighth Circuit includes most of the states located within the Louisiana Territory. Only Oklahoma, Kansas and Montana are outside the Eighth Circuit and thus the direct affect of this decision. *See Map of United States of America, Showing the Extent of Public Land Surverys, Remaining Public Lands, Historical Boundaries, National Forests, Indian Reservations, Wildlife Refuges, National Parks and Monuments* (1965), U.S.G.S. As a result, the Eighth Circuit's decision will be binding on aboriginal title claims brought by most tribes in the Louisiana Territory.

[8]There is one tribal claim presently pending that may be affected by the Eighth Circuit's decision. In Devils Lake Sioux Tribe v. State of North Dakota, et al., Civ. No. A2-86-87 (D. N.D.), the tribe is asserting aboriginal and treaty title to Devils Lake, a navigable lake located on the Devils Lake Reservation. While the aboriginal title issue has yet to be litigated there, there is no doubt the Eighth Circuit's decision imposes a very high standard on the tribe.

tribe's aboriginal occupancy of the area being mentioned only in passing in the briefs. *See Montana v. United States,* No. 79-1128, Petition for Rehearing, p. 2. As a result, the Court did not address the aboriginal title issue in *Montana.* The Crow Tribe petitioned for rehearing on the basis of its aboriginal title claim, but the petition was denied. 452 U.S. 911 (1981). That issue—whether a tribe can establish title to a navigable bed by its aboriginal occupancy rather than by a grant from the United States—has since been viewed as an open one. *See United States v. Pend Oreille Cty. Pub. Util. Dist. No. 1,* 585 F.Supp. 606, 608 (E.D. Wash. 1984): "The courts have never squarely addressed the question of competing claims to the same navigable waters by an Indian tribe and a state, where the Indian claim is based on aboriginal title."

Clearly there is tension between this Court's holding in *Montana* that a tribe's title to navigable waters depends upon a grant from the United States and those in other Supreme Court cases that aboriginal title arises independently of any grant from the United States. *See, e.g., Oneida Indian Nation of New York v. County of Oneida,* 414 U.S. 661 (1974); *United States v. Santa Fe Pacific Railroad Co.,* 314 U.S. 339 (1941); *Cramer v. United States,* 261 U.S. 219 (1923). At some point, this Court should address the apparent inconsistency between those two lines of cases on this important issue.

The aboriginal title issue was a primary one argued by the parties in this case in both the district court and the

court of appeals.[9] The Yankton Tribe prevailed in the district on the basis of its aboriginal title among other grounds, *see* 521 F.Supp. 463, and the Eighth Circuit avoided the issue only by creating a new exception to aboriginal title. The issue is also being contested in other litigation now pending. *See Pend Oreille, supra; Devils Lake Sioux Tribe v. State of South Dakota, et al., supra.*

This issue is obviously an open one that will recur until finally resolved by this Court. As prophesied by the Crow Tribe in its petition for rehearing in *Montana,* the aboriginal title issue remains the subject of litigation by parties. This case raises the issue clearly and squarely. There is no significant factual dispute to cloud the issue and there can be no question that the issue is at the heart of the case. The Court should take this opportunity to resolve the issue.

CONCLUSION

By any standard, this case raises serious issues that merit this Court's review. It involves an inconsistency with this Court's cases on aboriginal title that is of great practical concern to tribes throughout the Louisiana terri-

[9]As in most such cases, the Yankton Tribe also relies on a treaty, here the Treaty of 1858, 11 Stat. 743, as granting it recognized title to the lakebed. This argument has been made by the Tribe throughout this litigation. Inexplicably, the Eighth Circuit stated that the Tribe made no argument respecting a conveyance of any interest in the lakebed to the Tribe from the United States. Hence, the court of appeals did not reach the Tribe's treaty based argument. The Tribe would renew that argument here. *See* Questions Presented for Review.

tory. It also presents an opportunity to resolve a recurring issue left open by this Court in an earlier decision. For these reasons, the petition for writ of certiorari to the Eighth Circuit Court of Appeals should issue.

Respectfully submitted,

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APPENDIX

EXHIBIT 1
EIGHTH CIRCUIT DECISION

The YANKTON SIOUX TRIBE OF INDIANS, Appellee,

and

The United States of America, Intervenor/Appellant,

v.

STATE OF SOUTH DAKOTA and County of Charles Mix, South Dakota.

The YANKTON SIOUX TRIBE OF INDIANS, Appellee,

and

The United States of America,

v.

STATE OF SOUTH DAKOTA and County of Charles Mix, South Dakota, Intervenor/Appellants.

Nos. 85-5289, 85-5290.

United States Court of Appeals, Eighth Circuit.

Submitted Feb. 10, 1986.

Decided July 22, 1986.

Two counties and state of South Dakota appealed from summary judgment of the United States District Court for the District of South Dakota, 521 F.Supp. 463, ruling that Yankton Sioux Tribe held title to dry lake bed. The Court of Appeals, 683 F.2d 1160, vacated and remanded. On remand, the District Court, 566 F.Supp. 1507,

resolved navigability issue in tribe's favor and entered summary judgment for tribe. The United States was allowed to intervene. On various motions for, inter alia, summary judgment and amendment of judgment, the District Court, Fred J. Nichol, J., 604 F.Supp. 1146, determined that tribe owned bed of lake located within boundaries of reservation, and state appealed. The Court of Appeals, Fagg, Circuit Judge, held that absent claim of any congressional conveyance of lake bed to tribe, state held title to land underlying navigable lake.

Reversed.

Daniel J. Doyle, Asst. Atty. Gen., Pierre, S.D., and Robert L. Klarquist, Washington, D.C., for intervenor/appellant.

Arlinda Locklear, Washington, D.C. for appellee.

Before ARNOLD and FAGG, Circuit Judges, and OLIVER,* Senior District Judge.

FAGG, Circuit Judge.

The State of South Dakota appeals the district court's determination, 604 F.Supp. 1146, that the Yankton Sioux Tribe of Indians (Tribe) owns the bed of Lake Andes located within the boundaries of the Yankton Sioux Tribe Reservation. We reverse.

The United States acquired sovereign title to Lake Andes and the land underlying its waters in 1803, as part

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*The HONORABLE JOHN W. OLIVER, Senior United States District Judge for the Western District of Missouri, sitting by designation.

of the Louisiana Purchase. Prior to the Louisiana Purchase, the Tribe, then nomadic, began periodically to hunt buffalo in the area around Lake Andes. Sometime after the Louisiana Purchase, however, the Tribe settled in the area on a permanent and exclusive basis. *See* Joint Appendix 14, 157-58; *see also* Appellee's Brief at 4.

In 1858, the Tribe and the United States entered into a treaty in which the Tribe ceded all lands "owned, possessed, or claimed" by the Tribe except four hundred thousand acres that established the Yankton Sioux Tribe Reservation. 11 Stat. 743, 744. Lake Andes is located within the boundaries of the reservation. In consideration of the Tribe's cession, the United States agreed "[t]o protect the said Yan[k]tons in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home." *Id.*

The incident giving rise to this lawsuit occurred in 1976 when a number of individuals, all non-Indians, were permitted by South Dakota to enter the reservation to harvest a crop of kochia (fireweed) on the bed of Lake Andes. The Tribe then instituted this action against these individuals, claiming ownership to the lake bed and seeking a declaratory judgment, injunctive relief, and damages for wrongful conversion. South Dakota intervened in the Tribe's lawsuit, and the individual defendants were then dismissed from the case.

In ruling upon cross-motions for summary judgment, the district court determined that the Tribe held aboriginal title to the bed of Lake Andes. Furthermore, the district court concluded that the United States, in acquiring the lake bed as part of the Louisiana Purchase, gained only

"an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest." *Yankton Sioux Tribe of Indians v. Nelson,* 521 F.Supp. 463, 466 (D.S.D. 1981) (quoting *Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543, 586, 5 L.Ed. 681 (1823)). Finally, because the United States has not extinguished the Tribe's aboriginal title, the court concluded that the Tribe rather than the State of South Dakota owns the lake bed. *Id.*

On appeal, this court did not reach the merits of the Tribe's claim of ownership but instead remanded the claim back to the district court for a determination of whether Lake Andes was navigable both at the time of the 1858 treaty and at the time of South Dakota's entrance to the Union in 1889. *Yankton Sioux Tribe of Indians v. Nelson,* 683 F.2d 1160, 1163 n. 2 (8th Cir. 1982). On remand, the district court determined that Lake Andes was indeed navigable at those times. *Yankton Sioux Tribe of Indians v. Nelson,* 566 F.Supp. 1507 (D.S.D.1983).

None of the parties challenge the district court's determination that Lake Andes was navigable. Hence, the only issue before us is the ownership of the bed of Lake Andes.

Initially, this court must identify the source of South Dakota's and the Tribe's competing claims of ownership. South Dakota bases its claim of ownership on the United States' acquisition of the lake bed as part of the Louisiana Purchase.

As South Dakota properly observes, the United States, upon acquiring the Louisiana territory, immediately began to hold the land underlying all navigable waters in trust for future states, including South Dakota. *See Mon-*

tana v. United States, 450 U.S. 544, 551, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493 (1981). This trusteeship was necessary to ensure that South Dakota, upon its admission to the Union, would possess "the same rights, sovereignty and jurisdiction * * * as the original States possess within their respective borders," *Mumford v Wardwell,* 73 U.S. (6 Wall.) 423, 436, 18 L.Ed. 756 (1867), or, in other words, would "enter the Union and assume sovereignty on an 'equal footing' with the established States," *Montana,* 450 U.S. at 551, 101 S.Ct. at 1251. South Dakota contends that this trusteeship was fulfilled in 1889 when South Dakota was admitted into the Union and, as an incident of its sovereignty, it was granted ownership of all lands underlying navigable waters, including Lake Andes, subject only to the United States' power to ensure that such waters remain open for commerce. *See id.*

By contrast, the Tribe traces its claim of ownership to events predating South Dakota's admission to the Union. Specifically, the Tribe claims the record "indisputably establishes that [it] held aboriginal title to Lake Andes at the time of the 1858 Treaty." Appellee's brief at 8. Furthermore, the Tribe argues that its aboriginal title was confirmed in the Treaty of 1858. According to the Tribe, because the 1858 treaty recognized its aboriginal title, and because its title has never been extinguished, the Tribe still holds aboriginal title to the lake bed. As a result, the Tribe claims it, rather than the State of South Dakota, owns the lake bed.

[1, 2] Aboriginal title provides the original natives of this country the exclusive right to occupy the lands and waters used by them and their ancestors before the United

States asserted its sovereignty over these areas. *People of the Village of Gambell v. Clark,* 746 F.2d 572, 574 (9th Cir.1984); *see also Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667-69, 94 S.Ct. 772, 777-78, 39 L.Ed.2d 73 (1974). In order to establish aboriginal title, an Indian tribe must show that it actually, exclusively, and continuously used the property for an extended period of time. *Sac & Fox Tribe of Indians v. United States,* 179 Ct. Cl. 8, 383 F.2d 991, 998 *cert. denied,* 389 U.S. 900, 88 S.Ct. 212, 19 L.Ed.2d 217 (1967); *see also United States v. Sante Fe Pacific Railroad Co.,* 314 U.S. 339, 345, 62 S.Ct. 248, 251, 86 L.Ed. 260 (1941); Note, *Aboriginal Land Rights in the United States and Canada,* 60 N.D.L. Rev. 107, 113-14 (1984). Once established, the United States may extinguish aboriginal title at any time, *see United States v. Sioux Nation of Indians,* 448 U.S. 371, 415 n. 29, 100 S.Ct. 2716, 2740 n. 29, 65 L.Ed.2d 844 (1980); *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272, 279, 75 S.Ct. 313, 317, 99 L.Ed. 314 (1955), but an intent to extinguish Indian title by treaty must be plain and unambiguous. *County of Oneida, New York v. Oneida Indian Nation of New York State,* 470 U.S. 226, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985); *Santa Fe Pacific Railroad Co.,* 314 U.S. at 353-56; 62 S.Ct. at 255-56; *Bennett County v. United States,* 394 F.2d 8, 11-12 (8th Cir. 1968).

[3] In essence, at issue in this case are two competing claims of ownership, each of which is governed by distinct and well-established doctrines. We find it significant that the Tribe did not have any claim of aboriginal title to the lake bed until after the Louisiana Purchase of 1803. Although it appears that the district court determined the Tribe had established its aboriginal

title before the Louisiana Purchase, the record before us does not support such a finding. Indeed, the Tribe's brief even acknowledges that the Tribe's exclusive occupancy of the lake bed did not begin until approximately 1810. *See* Appellee's Brief at 4. Hence, to the extent that the district court held the Tribe's aboriginal title vested before the United States' soverign title, we conclude that finding is clearly erroneous.

[4] The Tribe claims, however, that aboriginal title can ripen after soverign title attaches and that the Tribe had been in the area long enough for its aboriginal title to attach by the time of the 1858 treaty. *See Turtle Mountain Band of Chippewa Indians v. United States,* 203 Ct.Cl. 426, 490 F.2d 935, 941 (1974). Even assuming that aboriginal title can ever attach to the bed of navigable waters, we hold that when sovereign title is in place and operation of the equal footing doctrine begins before any claim of aboriginal title has ripened, the state's claim of ownership is preeminent unless a recognized exception to the equal footing doctrine is applicable.

The only recognized exception to the equal footing doctrine is a congressional conveyance of the land underlying navigable waters. The intent to convey, however, must either be explicit or clearly inferrable from the circumstances. *See Montana,* 450 U.S. at 551-52, 101 S.Ct. at 1251; *United States v. Holt State Bank,* 270 U.S. 49, 54-55, 46 S.Ct. 197, 198-99, 70 L.Ed. 465 (1926). The Tribe does not claim any congressional conveyance of the lake bed, either explicitly or by inference.

Accordingly, we conclude that title to the lake bed passed to South Dakota in 1889 under the equal footing

doctrine. Our resolution of this issue makes it unnecessary for us to address the other claimss raised by the parties.

The judgment of the district court is reversed.

EXHIBIT 2
DISTRICT COURT DECISION

604 FEDERAL SUPPLEMENT

The YANKTON SIOUX TRIBE OF INDIANS, Plaintiff,

and

United States of America,
Intervenor-Plaintiff
Cross-Claimant,

v.

Kenneth NELSON, Daniel Svotas, and De Wit Harold, Defendants,

and

The State of South Dakota and Charles Mix County, South Dakota,
Intervenor-Defendants.

No. CIV 76-4066.

United States District Court,

D. South Dakota, S.D.

March 21, 1985.

Two counties and the state of South Dakota appealed from summary judgment of the United States District Court for the District of South Dakota, 521 F.Supp. 463, ruling that the Yankton Sioux Tribe held title to a dry lakebed. The Court of Appeals, 683 F.2d 1160, vacated and remanded. On remand, the District Court, 566 F.Supp. 1507, resolved navigability issue in tribe's favor and entered summary judgment for the tribe. United States' motion to intervene was granted. On various motions for, inter alia, summary judgment and amendment of judgment, the Dis-

trict Court, Nichol, Senior District Judge, held that: (1) United States was barred from litigating issues of tribe's aboriginal title to the land and effect of cession agreement, both by application of doctrine of mutual defensive collateral estoppel and by virtue of United States' status as post-judgment intervenor; (2) tribe's aboriginal title, which was recognized by 1858 treaty, was never clearly and unambiguously abrogated by Congress and was not extinguished by any voluntary abandonment; and (3) tribe's motion to amend judgment to clarify lakebed boundary description to include "as meandered by government survey in 1875" would be granted.

Plaintiff's motions granted; defendants' motions denied.

John W. Keller, Jr., Huron, S.D., Arlinda Locklear, Native American Rights Fund, Washington, D.C., Yvonne Knight, Native American Rights Fund, Boulder, Colo., for plaintiff.

Tom D. Tobin, Winner, S.D., David Albert Mustone, Tobin Law Offices, Washington, D.C., for Charles Mix County, S.D.

Ray P. Murley, Asst. U.S. Atty., Sioux Falls, S.D., John E. Lindskold, Atty., U.S. Dept. of Justice, Land & Natural Resources Div., Denver, Colo., for U.S. of America.

Daniel J. Doyle, Asst. Atty. Gen., Natural Resources Section, Pierre, S.D., for State of S.D.

MEMORANDUM DECISION AND ORDER

NICHOL, Senior District Judge.

INTRODUCTION

The controversy before the Court involves the ownership of the bed of Lake Andes. Ownership is claimed by the plaintiff, Yankton Sioux Tribe of Indians (Tribe) and by the intervenor-defendant State of South Dakota (State). The intervenor-defendant County of Charles Mix (County) claims a governmental interest, but no direct proprietary interest. The intervenor-plaintiff and cross-claimant United States of America (United States) wishes to protect a perpetual easement in the lakebed which the State conveyed to the United States in 1939 for the purpose of maintaining a wildlife refuge.

FACTS

The facts of the case are not complex, and are set out in *Yankton Sioux Tribe of Indians v. Nelson,* 521 F.Supp. 463 (D.S.D. 1981) (hereinafter called the 1981 Decision). It is necessary to add those facts which relate to the claims of the United States, because the United States did not intervene until 1983.

The Lake Andes Migratory Waterfowl Refuge was established in 1936 by executive order.[1] At that time, the United States acquired about 365 acres of land in Charles Mix County, and the refuge was opened. During the following three years, the refuge was enlarged somewhat by the acquisition of flowage easements from riparian landowners.

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1. Executive Order No. 7292, February 14, 1936.

On November 25, 1939, the State conveyed an easement in the entirety of the bed of Lake Andes to the United States. The United States has maintained and improved the refuge since that time.

PROCEDURAL HISTORY

The lawsuit was filed in August of 1976 by the Tribe against the individual defendants, to enjoin them from harvesting kochia (fireweed) from the then-dry lakebed. The State and County promptly intervened, and the individual defendants were dismissed. On September 19, 1981, this Court decided that the Tribe owns the lakebed, and therefore granted the Tribe's motion for summary judgment.[2]

The decision was appealed to a panel of the Eighth Circuit Court of Appeals, which did not reach the merits, but remanded the case to this Court for a factual determination regarding the navigability of Lake Andes.[3] The issue of navigability was subsequently resolved in the Tribe's favor,[4] and summary judgment for the Tribe was entered August 5, 1983. Subsequently both the Tribe and the County and State (jointly) moved to amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.

On September 1, 1983, the United States moved to intervene and also for leave to supplement the record. The motion to intervene, which was unopposed, was granted in

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2. *Yankton Sioux Tribe of Indians v. Nelson,* 521 F.Supp. 463 (D.S.D.1981).

3. *Yankton Sioux Tribe of Indians v. Nelson,* 683 F.2d 1160 (8th Cir.1982).

4. *Yankton Sioux Tribe of Indians v. Nelson,* 566 F.Supp. 1507 (D.S.D.1983).

November of 1983. Thereafter, the United States and the Tribe filed cross motions for summary judgment.[5] The State and County also filed a motion for summary judgment against the Tribe.[6]

The following motions are therefore before the Court: the Tribe's Rule 59(e) motion to amend the judgment, the Rule 59(e) motion of the State and County to amend the judgment, the Tribe's motion for summary judgment as against the United States, the United States' motion for summary judgment as against the Tribe, the joint motion for summary judgment of the State and County as against the Tribe, and the United States' motion for leave to supplement the record.[7]

CLAIMS OF THE UNITED STATES

The Tribe asserts that the actions of the United States in this matter constitute a serious breach of faith, and are offensive to the most basic tenets of the United States' trust responsibility toward the Tribe. I agree.

The United States Supreme Court established in *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831), that the relationship of the United States to an Indian tribe resembles that of a guardian to his ward. The concept of a federal trust responsibility toward Indians has

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5. The Tribe's motion for summary judgment was filed December 1, 1983; the United States motion was filed February 22, 1984.

6. Filed January 5, 1984.

7. While the United States intervened as a party plaintiff, its interests are clearly aligned with those of the State. The United States has advised the Court that any dispute between the United States and the State can be resolved by stipulation and therefore need not be decided by the Court.

since become a cornerstone of Indian law. F. Cohen, *Handbook on Federal Indian Law* at 220-21 (1982 ed.). Refining the concept, courts have imposed the fiduciary obligations of a private trustee on the United States when dealing with Indians, *Seminole Nation v. United States,* 316 U.S. 286, 297, 62 S.Ct. 1049, 1054, 86 L.Ed. 1480 (1942), held that the United States, when administering Indian property, is bound by the same principles of law as would be applied to an ordinary fiduciary, *Navajo Tribe v. United States,* 364 F.2d 320, 322-24, 176 Ct.Cl. 502 (1966), and allowed Indian tribes to sue the United States to enjoin a breach of that fiduciary duty, *see, e.g., Pyramid Lake Paiute Tribe v. Morton,* 354 F.Supp. 252 (D.D.C.1972). In the instant case, the actions of the United States toward the Tribe must therefore be examined in light of the duty of loyalty owed a beneficiary by its trustee.

The action was commenced in August of 1976. The State and County intervened shortly thereafter. Over the next six years the United States showed no inclination to attempt intervention, even when the Court formally invited such intervention by order dated October 28, 1982. When no response to the Court's invitation was heard by July 25, 1983, nine months later, the Court entered its Findings of Fact on Remand and denied the motion by the State and County to join the United States as a party.[8] On September 1, 1983, the United States finally moved to intervene. The United States' motion was made without excuse, apology or explanation for the delay, and none has been offered in the ensuing months. Because the United States threatened a separate lawsuit if its motion to intervene was denied, the

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8. *Yankton Sioux Tribe of Indians v. Nelson,* 566 F.Supp. 1507 (D.S.D.1983).

Tribe did not oppose the motion. The motion was therefore granted. "[I]t would [have been] a senseless waste of judicial resources to require the parties to begin again merely to arrive at the same place." *Kelly v. Carr,* 691 F.2d 800, 806 (6th Cir. 1980).

The conduct of the United States, when examined in the harsh light of its fiduciary duty, appears shabby and inexcusable. The duty of loyalty owed the Tribe by the United States has been at best ignored, at worst rejected. Nevertheless, given the United States' status as an intervenor, the Court has no alternative but to address the merits of the United States' claims.

The alternative claims made by the United States may be summarized as follows:

1. The Tribe did not have aboriginal title to the lakebed at the time the Treaty of 1858 was executed, and therefore the State acquired title to the bed of Lake Andes in 1889 under the equal footing doctrine.

2. The United States acquired any rights or title in the lakebed which the Tribe may have had by virtue of the Cession Agreement of 1892.

3. Any interest or title which the Tribe may have had was extinguished by the Tribe's voluntary abandonment of the bed of Lake Andes.

Aboriginal title and the Cession Agreement of 1892

[1] As to the first two claims, the United States takes the position that genuine issues of material fact exist which preclude the Court's consideration of summary judgment. I find, however, that the United States is barred from litigating the issues of aboriginal title and the Cession Agreement of 1892 before this Court by application of the

doctrine of mutual defensive collateral estoppel, and alternatively because of the United States' status as a post-judgment intervenor in this action.

The purpose of collateral estoppel is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudications." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). The United States Supreme Court has stated that in disputes involving the private rights of private litigants, "no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and there is no sound reason for burdening the courts with repetitive litigation." *Standefer v. United States*, 447 U.S. 10, 24, 100 S.Ct. 1999, 2008, 64 L.Ed.2d 689 (1980). Recently, the Supreme Court extended the doctrine of mutual defensive collateral estoppel to bar the government, as well as private parties, from raising the same issue already litigated against the same party in another case involving the same facts. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, —, 104 S.Ct. 575, 578, 78 L.Ed.2d 388 (1984).

The United States had a full and fair opportunity to litigate the issue of aboriginal title before the Indian Claims Commission in *Yankton Sioux Tribe v. United States*, 24 Ind.Cl.Comm. 208 (1970). The Commission found that the Tribe had aboriginal title to the lands described in the Commission's Finding of Fact 14, which describes an area including Lake Andes. The United States then had a second opportunity to refute the Tribe's title to the lakebed on appeal to the Court of Claims. That court, however, held that the Commission's order was "in all respects af-

firmed." *Sioux Tribe v. United States,* 500 F.2d 458, 475, 205 Ct.Cl. 148 (1974).

As to whether the Tribe relinquished its title to Lake Andes in the Cession Agreement of 1892, the United States again had a full and fair opportunity to litigate the issue before the Court of Claims. The case dealt with the compensation paid the Tribe by the United States in 1892; the parties disagreed about the number of acres ceded at that time. The Court of Claims agreed with the trial judge that "the computations of the acreage of the Yankton Sioux Reservation . . . by both parties were based upon official plats of surveys which did not include the bed of Lake Andes. . . ." *Yankton Sioux Tribe v. United States,* 623 F.2d 159, 183, 224 Ct.Cl. 62 (1980). The Tribe, concluded the court, was not entitled to compensation for the lakebed. *Id.* at 183-84. Therefore, it follows that the lakebed was not ceded to the United States in 1892, and that the United States is collaterally estopped from raising the issue here.

[2] It appears that the United States asks this Court to reach a decision inconsistent with the prior decisions of the Indian Claims Commission and the Court of Claims. This tactic is not new, and has not always been looked upon with favor by other courts. Discussing the government's practice of attempting to relitigate identical issues in different circuit courts, rather than to seek a petition for writ of certiorari to the Supreme Court, one judge noted, "The practice of fomenting inconsistency among various courts of appeals by government officials is unsettling to the course of justice. It is disrespectful toward the courts and hinders efficient judicial administration." *Goodman's Furniture Co. v. United States Postal Serv.,* 561 F.2d 462, 465 (3rd Cir.1977) (Weis, J., concurring).

Nor has the practice found a more welcome home in the Eighth Circuit. Chief Judge Lay has stated that asking the Eighth Circuit to relitigate a point lost in the Seventh Circuit is "a government litigation policy which abuses the judicial process." *May Dept. Stores Co. v. Williamson,* 549 F.2d 1147, 1149 (8th Cir.1977) (Lay, J., concurring).

The United States' tactic is no more appropriate between the Court of Claims and this District Court than between two circuit courts of appeals. The policy of consistency remains a reflection of basic equity as well as a reflection of the desire to assure reliability in the judicial process. Levin and Leeson, *Issue Preclusion Against the United States Government,* 70 Iowa L.Rev. 113, 130 (1984). Accordingly, the United States may relitigate neither the aboriginal title question, nor the issue of the Cession Agreement of 1892.

[3] Alternatively, I find that the United States, as an intervenor, is bound by this Court's holdings in the 1981 Decision that the Tribe has aboriginal title to Lake Andes, and that the Tribe did not cede the lakebed to the United States in 1892. "[P]ermission to intervene does not carry with it the right to relitigate matters *already determined in the case,* unless those matters would otherwise be subject to reconsideration." *Arizona v. California,* 460 U.S. 605, 614-15, 103 S.Ct. 1382, 1389, 75 L.Ed.2d 318 (1983) (emphasis added).

Extinguishment of title by abandonment

A proper analysis of the United States' final claim, that the Tribe's title was extinguished when it voluntarily abandoned the lakebed, requires a comparison of this case

with *United States v. Dann,* — U.S. —, 105 S.Ct. 1058, 84 L.Ed.2d 28 (1985), a case too recent to have been argued or briefed by the parties here. In *United States v. Dann,* the government claimed, *inter alia,* that Indian title had been extinguished as a result of federal administration of Indian lands for nearly 50 years. The Ninth Circuit Court of Appeals disagreed. The Supreme Court found it unnecessary to reach the merits, and reversed the court of appeals on a narrow question of statutory construction.

In 1951, the Western Shoshone Indians filed a claim with the Indian Claims Commission asserting that the United States owed the Western Shoshones certain sums for the taking of aboriginal title land in several western states. The Commission awarded the Indians a sum in excess of $26 million. 40 Ind.Cl.Comm. 318, 452 (1977). Subsequently, the Danns, defendants in *United States v. Dann,* claimed that the proceedings before the Indian Claims Commission had not decided the question of whether the Indians' title was extinguished, and sought to raise the issue in further litigation.

In 1978, the Ninth Circuit Court of Appeals held that the issue of title to the land claimed by the Danns (a small portion of the land involved in the 1951 claim) had not been decided by the Indian Claims Commission because the question of extinguishment was not in issue in those proceedings and was therefore never litigated. *United States v. Dann,* 572 F.2d 222, 226-27 (9th Cir.1978) (*Dann I*). The court also held in *Dann I* that neither collateral estoppel nor res judicata applied to bar the Danns from litigating the title question because the judgment of the Commission was not "final," in that the money awarded the Western Shoshones had not actually been distributed to the Indians. *Id.*

Following the Ninth Circuit's decision in *Dann I,* but before the case was decided by the district court on remand, the Court of Claims affirmed the money award of the Indian Claims Commission. *Temoak Band of Western Shoshone Indians v. United States,* 593 F.2d 994, 219 Ct. Cl. 346, *cert. denied,* 444 U.S. 973, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). The Supreme Court denied certiorari, and the award was therefore subject to no further judicial review. Accordingly, the Clerk of the Court of Claims certified the award to the General Accounting Office. The district court, after considering the mandate of the Ninth Circuit in *Dann I,* as well as the decision of the Court of Claims, held that the Indians were barred from relitigating the title issue because title was extinguished as of the date the award was certified to the General Accounting Office. *United States v. Dann,* No. R-74-60 (D.Nev. Apr. 25, 1980).

The case was again appealed to the Ninth Circuit for consideration of two issues:

(1) Whether certification of the award absent actual payment constituted a final determination for purposes of res judicata and collateral estoppel, and

(2) Whether federal administration of the lands in question for nearly 50 years pursuant to the Taylor Grazing Act, 43 U.S.C. section 315 (1976), caused the Indian title to be extinguished.

United States v. Dann, 706 F.2d 919 (9th Cir.1983), *rev'd and rem on other grounds,* — U.S. —, 105 S.Ct. 1058, 84 L.Ed.2d 28 (1985) (*Dann II*).

The appellate court found in favor of the Danns on both issues. The court rejected the government's argu-

ment that Indian title was extinguished by federal possession and control of the lands, stating that any actions taken by the executive, and thereafter said to extinguish Indian title, depend for their efficacy on Congress's acquiescence. *Dann II, supra,* 706 F.2d at 929, *citing United States v. Southern Pacific Transp. Co.,* 543 F.2d 676, 689 (9th Cir.1976). Moreover, the court also alluded to the fiduciary duty of the United States, observing that "[a]n extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Dann II, supra,* 706 F.2d at 929, *quoting United States v. Santa Fe Pacific R.R.,* 314 U.S. 339, 354, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941).

The United States Supreme Court granted certiorari solely to resolve the narrow question of whether certification of the award and the subsequent placement of funds by the United States into a Treasury account constitutes final payment, discharging the United States of all claims pursuant to section 22(a) of the Indian Claims Commission Act, 25 U.S.C. section 70u(a) (1976). *United States v. Dann, supra,* 105 S.Ct. at 1062. The Court held that final payment had been made, and the claim discharged; therefore, it never reached the issue of whether the United States had extinguished Indian title by administering the lands pursuant to the Taylor Grazing Act, the only issue pertinent to the case at bar. *Id.* Furthermore, the Supreme Court expressly declined to give an opinion as to whether the aboriginal title rights of the individual Indian defendants had been extinguished. *Id.,* 105 S.Ct. at 1065.

The question presented in *United States v. Dann,* regarding finality of payment, is not at issue in the instant case. The Tribe does not claim compensation for any "tak-

ing" of Lake Andes, and no such compensation was ever paid. I conclude that *United States v. Dann* is clearly distinguishable from the case at bar, and I may therefore proceed to consider the merits of the United States' claim of abandonment.

All parties agree that no genuine issue of material fact exists, making the question properly before the Court in a motion for summary judgment. The issue presented is whether tribal title to real property can be lost by mere inaction or abandonment, absent a plain and unambiguous expression of intent by Congress to extinguish Indian title. I find that it cannot, and therefore conclude that, even assuming arguendo it is factually correct, the United States' claim of abandonment is insufficient as a matter of law to extinguish the Tribe's title to the bed of Lake Andes.

[4-6] There are two types of Indian title: unrecognized or aboriginal title, and title which has been recognized by treaty or executive order. An Indian tribe holding aboriginal title to land has an exclusive right to use and occupy that land, a right that can be extinguished only by the sovereign. *See* F. Cohen, *Handbook on Federal Indian Law* at 487 (1982 ed.), and cases cited therein. Unless the aboriginal title has been expressly extinguished by the United States, any grant or conveyance of the property, whether by the Indian tribe, the United States, or another party under the claim of right, is subject to the Indian title and does not extinguish the Indian right of occupancy. *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941); *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 5 L.Ed. 681 (1821).

In the instant case, the Court held in the 1981 Decision that the Tribe holds aboriginal title to the bed of Lake Andes. As discussed above, the United States is barred from relitigating that question. Furthermore, the Court found in the 1981 Decision that the United States did not expressly extinguish the Tribe's aboriginal title to Lake Andes in the 1858 treaty, and the United States, as an intervenor, is bound by that finding. *Arizona v. California, supra,* 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318.

[7-9] The effect of the Treaty of 1858 on the Tribe's aboriginal title is unmistakable. A treaty is not, as the United States seems to argue here, a grant of rights to the Indians, but is rather a grant of rights from the Indians to the United States. *United States v. Wheeler,* 435 U.S. 313, 327 n. 24, 98 S.Ct. 1079, 1088 n. 24, 55 L.Ed.2d 303 (1978); *United States v. Winans,* 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905); *Klamath Indian Tribe v. Oregon Dept. of Fish & Wildlife,* 729 F.2d 609, 611 (9th Cir.), *cert. granted,* — U.S. —, 105 S.Ct. 242, 83 L.Ed.2d 180 (1984). When the United States and an Indian tribe negotiate a treaty, all rights not expressly ceded to the United States are thus retained by the tribe. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 208, 98 S.Ct. 1011, 1020, 55 L.Ed.2d 209 (1978); *United States v. Adair,* 723 F.2d 1394, 1413 (9th Cir.1984). The Tribe's aboriginal title to the lakebed, having survived the 1858 treaty, therefore became recognized title. The sole question remaining is whether, as the United States claims, the Tribe's treaty rights have been abrogated at any time

since 1858; if not, *a fortiori*, the Tribe's title has not been extinguished.[9]

[10] Congress has the absolute right to abrogate Indian treaty rights. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-68, 23 S.Ct. 216, 221-22, 47 L.Ed. 299 (1903). It is settled that such rights may be abrogated by "treaty, by the sword, by purchase, [or] by the exercise of complete dominion adverse to the right of occupancy. . . ." *Santa Fe Pacific, supra*, 314 U.S. at 347, 62 S.Ct. at 252, *quoting Beecher v. Wetherby*, 95 U.S. (5 Otto) 517, 525, 24 L.Ed. 440 (1877). In the instant case, the United States relies entirely on the phrase, "the exercise of complete dominion" to support its position. Courts have emphatically ruled, however, that no matter the method employed to abrogate treaty rights, Indian title cannot be extinguished absent a plain and unambiguous expression by Congress of its intent to do so. *Santa Fe Pacific, supra*, 314 U.S. at 353-54. This circuit has adamantly followed that rule. *See United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002, 1005 (8th Cir.1976).

[11] To determine whether Congress has manifested such an intent, courts customarily look first to determine whether treaty rights have been abrogated by statute.[10] The case at bar, however, is not a question of statutory abrogation of treaty rights. The United States does not allege any statutory abrogation. The government argues

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9. This is not, of course, to elevate the quality of recognized title above that of aboriginal title except in one respect: a taking of recognized title is compensable, while a taking of aboriginal title is not. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314 (1955); *United States v. Creek Nation*, 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331 (1935).

10. *See United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985).

only that the Tribe's title was extinguished through the establishment, enlargement and administration of the Lake Andes Wildlife Refuge, pursuant to an executive order, by virtue of the government's continuous, exclusive possession and control of the bed of Lake Andes. *See* Memorandum of the United States In Support of Its Motion for Summary Judgment at 7.

In the instant case, the United States relies on *United States v. Gemmill,* 535 F.2d 1145 (9th Cir.), *cert. denied,* 429 U.S. 982, 97 S.Ct. 496, 50 L.Ed.2d 591 (1976), which established that the inclusion of aboriginal lands within a national forest may extinguish aboriginal title. In *Dann II* the Ninth Circuit distinguished its earlier decision in *Gemmill,* however, noting that in *Gemmill* the Indians had been forcibly removed from the lands in question over 100 years before the decision, and that the forcible removal was a critical factor in the court's decision. *Dann II, supra,* 706 F.2d at 932-33.

In the instant case, the United States alleges neither a forcible removal of the Tribe, nor any act of Congress which would indicate intent to abrogate the Tribe's treaty rights. This Court must therefore look for some other clear and unambiguous expression of congressional intent to abrogate Indian title, particularly in light of the United States' trust responsibility toward the Tribe. There simply is no such clear and unambiguous expression of intent in this case.

The authority is clear. Abandonment, even if it can be shown, does not extinguish Indian title absent the express intent of Congress. The Tribe holds aboriginal title to Lake Andes, and its aboriginal title was recognized by

the Treaty of 1858. Since 1858, Congress has not clearly and unambiguously manifested an intent to abrogate the Tribe's treaty rights, and it follows that the Tribe's recognized title to the bed of Lake Andes has not been extinguished. The United States' abandonment argument must fail, and the Tribe must prevail on its motion for summary judgment.

United States' motion for leave to supplement the record

In view of the Court's finding that the United States is barred from relitigating the issues of aboriginal title and the Cession Agreement of 1892 by the doctrine of mutual defensive collateral estoppel, and alternatively because the United States, as an intervenor, has no right to relitigate matters already determined in the case, no purpose would be served by allowing the United States to supplement the record as to those issues. To allow the introduction of further evidence in the face of an absolute legal bar would be an unconscionable waste of judicial time and resources.

As to the abandonment issue, the United States wishes to introduce evidence pertaining to whether the Tribe voluntarily abandoned the lake either subsequent to the 1892 Cession Agreement, or when the wildlife refuge was established in the 1930's. The Court has found, however, that even assuming arguendo the United States can establish the factual basis, its claim fails as a matter of law, because abandonment does not extinguish Indian title absent the express intent of Congress to abrogate the Tribe's treaty rights. Ergo, permitting the United States to supplement the record as requested would be an empty and futile gesture, and further extend this seemingly intermin-

able litigation. There is absolutely no legal basis for the Court to do so.

CLAIMS OF THE STATE AND COUNTY

The State and County move for summary judgment for the purpose of seeking reconsideration of the Court's earlier disposition of the equal footing doctrine and 1892 Cession Agreement issues. *See* Memorandum of the State of South Dakota and Charles Mix County for Support of Cross Motion For Summary Judgment at 2. The Tribe argues that the State and County are bound by the 1981 Decision against them, and that absent a timely motion to amend,[11] the State and County cannot seek to relitigate any issues.

The State and County concede the absence of such a timely motion, but contend that this lawsuit was reopened for further litigation by all the parties when the Court established a schedule for the filing of summary judgment motions by the Tribe and the United States. The United States, they argue, was bound by the August 5, 1983 judgment when it intervened in the case, just as were the other parties; therefore, permitting the United States and the Tribe to litigate issues raised in the complaint in intervention could only mean that the Court intended the prior judgment to be set aside. I find, however, that the August 5, 1983 judgment binds the State and County, and that the judgment has not been set aside.

The arguments of the State and County are made *ipse dixit,* except for the proposition that an intervenor is bound

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11. The only issue raised by the Rule 59(e) motion of the State and County presently before the Court is the location of the lakebed boundary.

by all prior orders and adjudications in the lawsuit. *See Galbreath v. Metropolitan Trust Co. of Calif.*, 134 F.2d 569 (10th Cir.1943). The Court accepts that general principle of law, as restated by the Supreme Court in *Arizona v. California, supra,* 103 S.Ct. at 1389. But as noted above, Justice Rehnquist, writing for the Court in *Arizona v. California,* was very specific that the bar on relitigation applies only to matters already determined in the case, and on that basis I have already found that the United States is barred from relitigating two such issues.

[12, 13] The United States' claim of abandonment subsequent to 1858, however, had not been previously litigated in this action, and an intervenor is certainly not barred from raising new issues in a complaint in intervention. If that were the case, an interested party would never seek to intervene after a judgment, nor, for that matter, would post-judgment intervention ever be permitted. Therefore, because it is well settled that intervention after entry of judgment is proper in some situations, *Nevilles v. Equal Employment Opportunity Com'n.*, 511 F.2d 303, 305 (8th Cir.1975), it follows that an intervenor is not bound by a prior judgment in the literal sense of res judicata. This interpretation also comports with the 1966 Amendment to Federal Rule of Civil Procedure 24. *See also Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531, 541 (8th Cir. 1970).

[14] I conclude that the post-judgment intervention of the United States and the Court's subsequent actions in scheduling motions for summary judgment to be filed by the Tribe and the United States did not have the effect of setting aside the August 5, 1983 judgment and reopening the case for further litigation.

[15] Moreover, even if I were to find that the judgment had been set aside (which I expressly decline to do), I would find that the law of the case doctrine serves to bar the State and County from relitigating issues previously decided in the case. A prior decision in a case is the "law of the case" in all subsequent proceedings unless:

(1) The evidence sought to be introduced in the subsequent proceeding is substantially different from that first considered by the court, or

(2) The prior decision is clearly erroneous and works manifest injustice.

Continental Bank & Trust Co. v. American Bonding, 630 F.2d 606, 608 (8th Cir.1980). While this rule of practice is not a limit of power, it is nevertheless a salutary one, and must be followed in both district and appellate courts. *Id.*

[16] The State and County claim to be seeking reconsideration of the equal footing doctrine and 1892 Cession Agreement issues on the basis of "new matters", thereby satisfying the first prong of the *Continental Bank & Trust Co.* test. In fact, however, they cite no significantly new or different legal authority, and make no new legal arguments. Neither do they seek to introduce any "substantially different" evidence. In short, they present the Court with no compelling reason to depart from the law of the case.

Furthermore, the State and County do not contend, nor does the Court find, that the prior decision in this case is clearly erroneous and works manifest injustice. On the contrary, to needlessly protract this litigation beyond the nearly nine years it has already consumed would be to

work manifest injustice. Accordingly, I find that while the case has not been reopened for further litigation, the State and County would in any event be precluded from relitigating the equal footing doctrine and 1892 Cession Agreement issues because the Court's earlier ruling on those issues is the law of the case.

RULE 59(e) MOTIONS TO AMEND THE JUDGMENT

[17] The motion of the Tribe and the joint motion of the State and County to amend the judgment may be considered together. The language in the August 5, 1983 judgment which the parties contend requires clarification is found in the second paragraph, where the Court finds the Tribe to be the owner "of the Lake Andes bed." The issue is the precise location of the lakebed boundary.

The Tribe wishes to define the area of ownership to be "the Lake Andes bed, as meandered by government survey in 1875." The State and County would have the Tribe described as the owner "of that portion of the bed of Lake Andes over which the State of South Dakota has exercised ownership under claim of right."

This disagreement arises late in the litigation, to say the least. From the outset, both sides have referred to the meander line surveyed in 1875 in pleadings and briefs, and both have relied upon its accuracy. In the usual quiet title action, of course, the boundaries of the property in question are determined by the description in the complaint. This lawsuit, however, began as a trespass action, and the property was only generally described until the Tribe filed its motion for summary judgment, in which the lakebed was described as having dimensions of eight miles

by one and one-half miles, determined by the official government survey. In addition, the Tribe attached to its motion a plat map showing the 1875 meander line.

The Tribe argues that establishing the meander line as the boundary is the proper resolution of the question both as a matter of law, and as a practical matter. It is the Tribe's position that reliance on the meander line provides a clear and ascertainable boundary which will not implicate the property rights of non-parties. I agree.

The language proposed by the State and County is so obscure that it would almost certainly engender further litigation if it were incorporated into the judgment. Neither the parties nor the adjoining landowners have any way to determine with certainty which portion of the lakebed was historically subject to the State's claim of right. To adopt it would therefore result in the exact situation the State and County seek to avoid—riparian landowners could point to no definite boundary separating their property from the Tribe's property.

The Tribe's proposed amendment, on the other hand, does nothing more than incorporate the language of the pleadings into the express language of the judgment, yielding a result similar to that of a more routine quiet title action. Furthermore, establishing the meander line as a boundary has the advantage of certainty for parties and non-parties alike.

However, the Court is mindful of the argument made by the United States, that the meander line is merely a representation of the ordinary high water mark at the time of the survey, and not a fixed boundary. The United States cites *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 94 S.Ct.

517, 38 L.Ed.2d 526 (1973), for the "usual rule" of riparian ownership, that the boundary of the property riparian to a navigable body of water is subject to loss or gain as the water boundary changes. The Court rejects this authority, however, in view of the fact that *Bonelli* was expressly overruled by the Supreme Court in *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977).

Moreover, there is nothing "usual" about the instant case. Allowing riparian landowners to exercise ownership of all the land to the water's edge would effectively destroy the Tribe's ownership of the bed in dry years. This case is therefore analogous to those cases in which a substantial amount of land is formed by accretion between the meander line and the water. Faced with such facts, courts have not hesitated to fix the meander line as the boundary, which is the only equitable solution. *See DeBoer v. United States*, 653 F.2d 1313, 1315 (9th Cir.1981), and cases cited therein. Also analogous is the equitable principle that land is equally subject to loss by erosion as it is to gain. *See Hughes v. Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed. 2d 530 (1967).

In the instant case, consideration of the equities compels the same result as in those cases where land is formed by accretion below the meander line. It would unjustly enrich the landowners adjoining Lake Andes to hold that their property, in dry years, extends to the water's edge. The result would be that in years when the lakebed was completely dry, as it was when this litigation began, the Tribe would own nothing. I refuse to accept such an inequitable outcome. The meander line is the logical, natural and equitable boundary of the lakebed.

The Tribe's proposed amendment is accepted, the State and County's is rejected. The phrase "the Lake Andes bed, as meandered by government survey in 1875" will be substituted for the phrase "of the Lake Andes bed" in the August 5, 1983 judgment.

SUMMARY

This case is now nearly nine years old. Although remanded for a simple factual determination only, the State, the County and the United States would have this Court discard its prior rulings and reopen every issue for further litigation. Such a sweeping reconsideration of the issues, however, would serve neither the law nor justice. This Court and others have furnished the parties every opportunity to argue and reargue the case. The lawsuit must now, finally, be brought to an end.

The Yankton Sioux Tribe of Indians owns the bed of Lake Andes.

IT IS THEREFORE ORDERED that the United States' Motion for Summary Judgment, the United States' Motion For Leave to Supplement the Record, the State and County's Rule 59(e) Motion to Amend the Judgment, and the State and County's Motion for Summary Judgment are DENIED, and

IT IS FURTHER ORDERED that the Tribe's Motion for Summary Judgment and the Tribe's Rule 59(e) Motion to Amend the Judgment are GRANTED.

This memorandum decision constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure. Counsel for the plaintiff Yankton Sioux Tribe of Indians may prepare an appropriate judgment in accordance with this decision.

EXHIBIT 3
ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 85-5289-SD

The Yankton Sioux Tribe of Indians,

Appellee,

and the United States of America,

vs.

State of South Dakota and County of Charles Mix, South Dakota.

Re: No. 82-5290-SD

The Yankton Sioux Tribe of Indians,

Appellee,

and the United States of America,

vs.

State of South Dakota and County of Charles Mix, South Dakota,

Intervenor/Appellants.

Appeals from the United States District Court for the District of South Dakota.

Appellee's petition for rehearing en banc and the post-argument filings of the parties have been considered by the Court; the petition for rehearing en banc is denied. Judges Heaney and McMillian would have granted the petition.

Petition for rehearing by the panel is also denied.

November 7, 1986

EXHIBIT 4
TREATY OF 1858

TREATY WITH THE YANKTON SIOUX, 1858.

Articles of agreement and convention made and concluded at the city of Washington, this nineteenth day of April, A. D. one thousand eight hundred and fifty-eight, by Charles E. Mix, commissioner on the part of the United States, and the following-named chiefs and delegates of the Yancton tribe of Sioux or Dacotah Indians, viz:

Pa-la-ne-a-pa-pe, the man that was struck by the Ree.
Ma-to-sa-be-che-a, the smutty bear.
Charles F. Picotte, Eta-ke-cha.
Ta-ton-ka-wete-co, the crazy bull.
Pse-cha-wa-kea, the jumping thunder.
Ma-ra-ha-ton, the iron horn.
Mombe-kah-pah, one that knocks down two.
Ta-ton-ka-e-yah-ka, the fast bull.
A-ha-ka-ma-ne, the walking elk.
A-ha-ka-na-zhe, the standing elk.
A-ha-ka-ho-che-cha, the elk with a bad voice.
Cha-ton-wo-ka-pa, the grabbing hawk.
E-ha-we-cha-sha, the owl man.
Pla-son-wa-kan-na-ge, the white medicine cow that stands.
Ma-ga-scha-che-ka, the little white swan.
Oke-che-la-wash-ta, the pretty boy.

(The three last names signed by their duly-authorized agent and representative, Charles F. Picotte,) they being thereto duly authorized and empowered by said tribe of Indians.

Article 1. The said chiefs and delegates of said tribe of Indians do hereby cede and relinquish to the United States all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof, situated and described as follows, to wit—Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres. They, also, hereby relinquish and abandon all claims and complaints about or growing out of any and all treaties heretofore made by them or other Indians, except their annuity rights under the treaty of Laramie, of September 17, A. D. 1851.

Article 2. The land so ceded and relinquished by the said chiefs and delegates of the said tribe of Yanctons is and shall be known and described as follows, to wit—

"Beginning at the mouth of the Tehan-kas-an-data or Calumet or Big Sioux River; thence up the Missouri River to the mouth of the Pa-hah-wa-kan or East Medicine Knoll River; thence up said river to its head; thence in a direction to the head of the main fork of the Wan-dush-kah-for or Snake River; thence down said river to its junction with the Tchan-san-san or Jaques or James River; thence in a direct line to the northern point of Lake Kampeska; thence along the northern shore of said lake and its outlet to the junction of said outlet with the said Big Sioux River; thence down the Big Sioux River to its junction with the Missouri River."

And they also cede and relinquish to the United States all their right and title to and in all the islands of the Mis-

souri River, from the mouth of the Big Sioux to the mouth of the Medicine Knoll River.

And the said chiefs and delegates hereby stipulate and agree that all the lands embraced in said limits are their own, and that they have full and exclusive right to cede and relinquish the same to the United States.

Article 3. The said chiefs and delegates hereby further stipulate and agree that the United States may construct and use such roads as may be hereafter necessary across their said reservation by the consent and permission of the Secretary of the Interior, and by first paying the said Indians all damages and the fair value of the land so used for said road or roads, which said damages and value shall be determined in such manner as the Secretary of the Interior may direct. And the said Yanctons hereby agree to *remove* and *settle* and *reside* on said reservation within one year from this date, and, until they do so remove, (if within said year,) the United States guarantee them in the quiet and undisturbed possession of their present settlements.

Article 4. In consideration of the foregoing cession, relinquishment, and agreements, the United States do hereby agree and stipulate as follows, to wit:

1st. To protect the said Yanctons in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.

2. To pay to them, or expend for their benefit, the sum of sixty-five thousand dollars per annum, for ten years,

commencing with the year in which they shall remove to, and settle and reside upon, their said reservation—forty thousand dollars per annum for and during ten years thereafter—twenty-five thousand dollars per annum for and during ten years thereafter—and fifteen thousand dollars per annum for and during twenty years thereafter; making *one million and six hundred thousand dollars in annuities in the period of fifty years,* of which sums the President of the United States shall, from time to time, determine what proportion shall be paid to said Indians, in cash, and what proportion shall be expended for their benefit, and, also, in what manner and for what objects such expenditure shall be made, due regard being had in making such determination to the best interests of said Indians. He shall likewise exercise the power to make such provision out of said sums as he may deem to be necessary and proper for the support and comfort of the aged or infirm, and helpless orphans of the said Indians. In case of any material decrease of said Indians, in number, the said amounts may, in the discretion of the President of the United States, be diminished and reduced in proportion thereto— or they may, at the discretion of the President of the United States, be discontinued entirely, should said Indians fail to make reasonable and satisfactory efforts to advance and improve their condition, in which case, such other provisions shall be made for them as the President and Congress may judge to be suitable and proper.

3d. In addition to the foregoing sum of one million and six hundred thousand dollars as annuities, to be paid to or expended for the benefit of said Indians, during the period of fifty years, as before stated, the United States

hereby stipulate and agree to expend for their benefit the sum of fifty thousand dollars more, as follows, to wit: Twenty-five thousand dollars in maintaining and subsisting the said Indians during the first year after their removal to and permanent settlement upon their said reservation; in the purchase of stock, agricultural implements, or other articles of a beneficial character, and in breaking up and fencing land; in the erection of houses, store-houses, or other needful buildings, or in making such other improvements as may be necessary for their comfort and welfare.

4th. To expend ten thousand dollars to build a school-house or school-houses, and to establish and maintain one or more normal-labor schools (so far as said sum will go) for the education and training of the children of said Indians in letters, agriculture, the mechanic arts, and housewifery, which school or schools shall be managed and conducted in such manner as the Secretary of the Interior shall direct. The said Indians hereby stipulating to keep constantly threat, during at least nine months in the year, all their children between the ages of seven and eighteen years; and if any of the parents, or others having the care of children, shall refuse or neglect to send them to school, such parts of their annuities as the Secretary of the Interior may direct, shall be withheld from them and applied as he may deem just and proper; and such further sum, in addition to the said ten thousand dollars, as shall be deemed necessary and proper by the President of the United States, shall be reserved and taken from their said annuities, and applied annually, during the pleasure of the President to the support of said schools, and to furnish said Indians with assistance and aid and instruction in agricul-

tural and mechanical pursuits, including the working of the mills, hereafter mentioned, as the Secretary of the Interior may consider necessary and advantageous for said Indians; and all instruction in reading shall be in the English language. And the said Indians hereby stipulate to furnish, from amongst themselves, the number of young men that may be required as apprentices and assistants in the mills and mechanic shops, and at least three persons to work constantly with each white laborer employed for them in agriculture and mechanical pursuits, it being understood that such white laborers and assistants as may be so employed *are* thus employed more for the instruction of the said Indians than merely to work for their benefit; and that the laborers so to be furnished by the Indians may be allowed a fair and just compensation for their services, to be fixed by the Secretary of the Interior, and to be paid out of the shares of annuity of such Indians as are able to work, but refuse or neglect to do so. And whenever the President of the United States shall become satisfied of a failure, on the part of said Indians, to fulfil the aforesaid stipulations, he may, at his discretion, discontinue the allowance and expenditure of the sums so provided and set apart for said school or schools, and assistance and instruction.

5th. To provide the said Indians with a mill suitable for grinding grain and sawing timber; one or more mechanic shops, with the necessary tools for the same; and dwelling-houses for an interpreter, miller, engineer for the mill, (if one be necessary,) a farmer, and the mechanics that may be employed for their benefit, and to expend therefor a sum not exceeding fifteen thousand dollars.

Article 5. Said Indians further stipulate and bind themselves to prevent any of the members of their tribe

from destroying or injuring the said houses, shops, mills, machinery, stock, farming-utensils, or any other thing furnished them by the Government, and in case of any such destruction or injury of any of the things so furnished, or their being carried off by any member or members of their tribe, the value of the same shall be deducted from their general annuity; and whenever the Secretary of the Interior shall be satisfied that said Indians have become sufficiently confirmed in habits of industry and advanced in the acquisition of a practical knowledge of agriculture and the mechanic arts to provide for themselves, he may, at his discretion, cause to be turned over to them all of the said houses and other property furnished them by the United States, and dispense with the services of any or all persons hereinbefore stipulated to be employed for their benefit, assistance, and instruction.

Article 6. It is hereby agreed and understood that the chiefs and head-men of said tribe may, at their discretion, in open council, authorize to be paid *out of their said annuities* such a sum or sums as may be found to be necessary and proper, not exceeding in the aggregate one hundred and fifty thousand dollars, to satisfy their just debts and obligations, and to provide for such of their half-breed relations as do not live with them, or draw any part of the said annuities of said Indians: *Provided, however,* That their said determinations shall be approved by their agent for the time being, and the said payments authorized by the Secretary of the Interior: *Provided, also,* That there shall not be so paid out of their said annuities in any one year, a sum exceeding fifteen thousand dollars.

Article 7. On account of their valuable services and liberality to the Yanctons, there shall be granted in fee to

Charles F. Picotte and Zephyr Rencontre, each, one section of six hundred and forty acres of land, and to Paul Dorin one-half a section; and to the half-breed Yancton, wife of Charles Reulo, and her two sisters, the wives of Eli Bedaud and Augustus Traverse, and to Louis Le Count, each, one-half a section. The said grants shall be selected in said ceded territory, and shall not be within said reservation, nor shall they interfere in any way with the improvements of such persons as are on the lands ceded above by authority of law; and all other persons (other than Indians, or mixed-bloods) who are now residing within said ceded country, by authority of law, shall have the privilege of entering one hundred and sixty acres thereof, to include each of their residences or improvements, at the rate of one dollar and twenty-five cents per acre.

Article 8. The said Yancton Indians shall be secured in the free and unrestricted use of the red pipe-stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire.

Article 9. The United States shall have the right to establish and maintain such military posts, roads, and Indian agencies as may be deemed necessary within the tract of country herein reserved for the use of the Yanctons; but no greater quantity of land or timber shall be used for said purposes than shall be actually requisite; and if, in the establishment or maintenance of such posts, roads, and

agencies, the property of any Yancton shall be taken, injured, or destroyed, just and adequate compensation shall be made therefor by the United States.

Article 10. No white person, unless in the employment of the United States, or duly licensed to trade with the Yanctons, or members of the families of such persons, shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians, nor shall said Indians alienate, sell, or in any manner dispose of any portion thereof, except to the United States. Whenever the Secretary of the Interior shall direct, said tract shall be surveyed and divided as he shall think proper among said Indians, so as to give to each head of a family or single person a separate farm, with such rights of possession or transfer to any other member of the tribe or of descent to their heirs and representatives as he may deem just.

Article 11. The Yanctons acknowledge their dependence upon the Government of the United States, and do hereby pledge and bind themselves to preserve friendly relations with the citizens thereof, and to commit no injuries of depredations on their persons or property, nor on those of members of any other tribe or nation of *of* Indians; and in case of any such injuries or depredations by said Yanctons, full compensation shall, as far as possible, be made therefor out of their tribal annuities, the amount in all cases to be determined by the Secretary of the Interior. They further pledge themselves not to engage in hostilities with any other tribe or nation, unless in self-defence, but to submit, through their agent, all matters of dispute and difficulty between themselves and other Indians for the decision of the President of the United States, and to acquiesce in and abide thereby. They also agree to deliver, to

the proper officer of the United States all offenders against the treaties, laws, or regulations of the United States, and to assist in discovering, pursuing, and capturing all such offenders, who may be within the limits of their reservations, whenever required to do so by such officer.

Article 12. To aid in preventing the evils of intemperance, it is hereby stipulated that if any of the Yanctons shall drink, or procure for others, intoxicating liquor, their proportion of the tribal annuities shall be withheld from them for at least one year; and for a violation of any of the stipulations of this agreement on the part of the Yanctons they shall be liable to have their annuities withheld, in whole or in part, and for such length of time as the President of the United States shall direct.

Article 13. No part of the annuities of the Yanctons shall be taken to pay any debts, claims, or demands against them, except such existing claims and demands as have been herein provided for, and except such as may arise under this agreement, or under the trade and intercourse laws of the United States.

Article 14. The said Yanctons do hereby fully acquit and release the United States from all demands against them on the part of said tribe, or any individual thereof, except the beforementioned right of the Yanctons to receive an annuity under said treaty of Laramie, and except, also, such as are herein stipulated and provided for.

Article 15. For the special benefit of the Yanctons, parties to this agreement, the United States agree to appoint an agent for them, who shall reside on their said reservation, and shall have set apart for his sole use and

occupation, at such point as the Secretary of the Interior may direct, one hundred and sixty acres of land.

Article 16. All expenses of the making of this agreement, and of surveying the said Yancton reservation, and of surveying and marking said pipe-stone quarry, shall be paid by the United States.

Article 17. This instrument shall take effect and be obligatory upon the contracting parties whenever ratified by the Senate and the President of the United States.

In testimony whereof, the said Charles E. Mix, commissioner, as aforesaid, and the undersigned chiefs, delegates, and representatives of the said tribe of Yancton Indians, have hereunto set their hands and seals at the place and on the day first above written.

Charles E. Mix, Commissioner. [L. S.]

Pa-la-ne-apa-pe, or the Man that was struck by the Ree, his x mark. [L. S.]

Ma-to-sa-be-che-a, or the Smutty Bear, his x mark. [L. S.]

Charles F. Picotte, or Eta-ke-cha. [L. S.]

Ta-ton-ka-wete-co, or the Crazy Bull, his x mark. [L. S.]

Pse-cha-wa-kea, or the Jumping Thunder, his x mark. [L. S.]

Ma-ra-ha-ton, or the Iron Horn, his x mark. [L. S.]

Nombe-kah-pah, or One that knocks down two, his x mark. [L. S.]

Ta-ton-ka-e-yah-ka, or the Fast Bull, his x mark. [L. S.]

A-ha-ka Ma-ne, or the Walking Elk, his x mark. [L. S.]

A-ha-ka-na-zhe, or the Standing Elk, his x mark. [L. S.]

A-ha-ka-ho-che-cha, or the Elk with a bad voice, his x mark. [L. S.]

Cha-ton-wo-ka-pa, or the Grabbing Hawk, his x mark. [L. S.]

E-ha-we-cha-sha, or the Owl Man, his x mark. [L. S.]

Pla-son-wa-kan-na-ge, or the White Medicine Cow that stands, by his duly authorized delegate and representative, Charles F. Picotte. [L. S.]

Ma-ga-scha-che-ka, or the Little White Swan, by his duly authorized delegate and representative, Charles F. Picotte. [L. S.]

O-ke-che-la-wash-ta, or the Pretty Boy, by his duly authorized delegate and representative, Chas. F. Picotte. [L. S.]

Executed in the presence of—

A. H. Redfield, agent.
J. B. S. Todd.
Theophile Bruguier.
John Dowling.
Fr. Schmidt.
John W. Wells.
D. Walker.
E. B. Grayson.
S. J. Johnson.
George P. Mapes.
H. Bittinger.
D. C. Davis.
Zephier Roncontre, his x mark,
United States interpreter.

Witness:

J. B. S. Todd,
Paul Dorain, his x mark.
Charles Rulo, his x mark.

Witness:

J. B. S. Todd.

EXHIBIT 5
EXCERPTS FROM JOINT APPENDIX

SIOUX INDIANS III

ETHNOHISTORICAL REPORT
ON THE YANKTON SIOUX

Alan R. Woolworth

YANKTON CHRONOLOGY

John L. Champe

(SEAL)

Garland Publishing, Inc., New York & London
1974

* * *

CHAPTER II

The Yankton Start to Move Into Royce Area No. 410 ca. 179L-1805

The precise date at which the Yankton began their move into southeastern South Dakota and began taking over the former lands of the Teton Dakota is unknown, but can be inferred from historical documents.

The first concrete evidence of their occupancy of this area is made by Jean Baptiste Truteau who left St. Louis on June 7, 1794 and arrived above the mouth of the White River where he encountered Indians on September 30, 1794. Fortunately, these Indians were of the "nation of the

Yankton Sioux who lived on the Des Moines River'' where Truteau had previously traded. There people were hunting. Once Truteau was in their grasp he found to his dismay that there were only three Yankton families with this hunting party:

"But they had hidden from me that they were only three lodges of their (Yankton) nation and that their band was largely composed of Teton Sioux, . . . The vast prairies, which they cross north of the Missouri were presently stripped of wild animals and they were obliged to come to hunt the buffalo and wild cows on the banks of the Missouri and even to cross over to the west bank for hunting. (Nasatir, "Journal of Truteau on the Missouri River, 1794-1975"; *Before Lewis and Clark,* 1952, vol. 1, p. 269; Def. Ex. No. 23).

Here we have the first tangible evidence of Yankton in Royce Area No. 410 and that of only three lodges of Yanktons from the Des Moines River. As of this date, the Yankton were then only casually hunting in this region and not in great numbers either.

Speaking further of the Sioux, Truteau says of the region around the mouth of the Big Sioux River; "The Sioux nations that frequent the St. Pierre and Des Moines rivers come at different times of the year to hunt the buffalo and other wild animals." (Trutean in Nasatir, 1952, vol. 2, p. 378; Def. Ex. No. 24). Again one can infer from Truteau's writings that Yankton use of the region around the Big Sioux River was only seasonal; for the purpose of hunting, and in small numbers.

Speaking of the Teton Sioux, Truteau states that each year the Teton traded many furs to other Sioux on the

St. Peters (Minnesota) and Des Moines Rivers. They traded them for merchandise which they in turn obtained from the traders from Canada who frequented those streams. (Ibid, p. 382). He wrote of the Sioux seasonal cycle as follows:

"At the beginning of the month of April, the Sioux wander far from the banks of the Missouri and usually return in the course of the months of July and August and scour its two banks until the springtime (Ibid).

In the year 1800, Jean Baptiste Faribault (sic) conducted an extensive trade with the bands of Dakota at a post called Redwood, located about two hundred miles up the Des Moines River in northwestern Iowa. Associated with him was an old trader named Deban who had lived with the Yankton for many years. He remained at this post until 1804. The region where he was stationed abounded with beaver, otter, deer, bear and other wild animals and was the favorite resort of several Sioux bands; the Sacs and Foxes, Iowas and other tribes with whom the Sioux were on friendly terms. (Sibley, "Memoir of Jean B. Fairbault;" *Minnesota Historical Society Collections,* Vol. 3, 1880, p. 171, Def. Ex. No. 25).

A more satisfactory and complete account of some Yankton for the period of 1802-1804 is provided by Pierre-Antonine Tabeau who traded in the vicinity of Cedar Island about 30 miles below present Pierre, South Dakota. He mentions "Same Yankton hunters who traded more than a hundred beaver skins each when they hunted in the territory of St. Peters River, brought me fifteen skins this year (1804) each after having scoured all fall the east bank of the Missouri and having visited the

sources of all the little rivers and streams emptying into it in a space of more than a hundred leagues."

"The chief of the tribe tells me that the beaver begins to be common only beyond the great prairies end at the approach of the branches of the St. Peters River, and he declared to me that because of it he abandoned the Missouri although the buffalo cow were far more abundant there." (Abel, A. H., 1939, *Tabeau's Narrative of Loisel's Expedition to the Upper Missouri*, p. 85; Def. Ex. No. 26).

It would appear that at least some of the Yankton hunted on the many streams flowing into the St. Peters or Minnesota River from west and south in the late 1790's and early 1800's and that they had unsuccessfully hunted beaver in the fall of 1803 along the east bank of the Missouri River.

Further, this band of Yankton must have been living in Royce Area No. 410 at this date as Tabeau mentions seeing them everyday.

It is worthy of comment that they were so thoroughly converted into trappers so that they would abandon an area along the Missouri rich in buffalo to hunt beaver near the small streams flowing into the St. Peters River.

Another band of Yankton, "now located on the River James, accustomed to the beaver hunt who hunted them extensively on the branches of the River of the Mahers (Des Moines), also scoured the east bank of the Missouri and made only a very ordinary catch in 1803. This year wintered with Mr. McLanell on the same river and have had no better success, while the Mahas and the Poncas

who hunted lower river (on the Missouri) brought in a very good number. (Ibid,pp. 85-86; Def. Ex. No. 26).

Here, we have a definite mention of a band of Yanktons "located on the River James" in Royce Area No. 410 in 1804. They were probably the same group who were met here in 1804 by Lewis and Clark.

Tabeau also made a classification of the Sioux tribes. In it, he lists the "Hyinctons" as one of the major divisions of the five Dakota tribes and makes the statement, "A part of the fourth (division—Yankton) visits it as well as the River of the Mohens (Des Moines). Another part occasionally the Missouri, territory proper to the Titons (Tetons) alone." (Ibid, p. 102; Def. Ex. No. 26).

Here, he implied that a portion of the Yanktons visited the Minnesota River as well as the Des Moines River. Another portion of the Yanktons occasionally visited the Missouri River which was the territory of the Teton Dakota.

In a sub-division of his major Dakota classification he differentiates between the "Yinctons of the North" (Yanktonai) and the "Yinctons of the South". The latter group were called "Sitchanrhou-Yincton" and he states: "These are Yincton of the Tacohimboto (Tacohin-cotaux) the South, now at the seascape James River." He does not, unfortunately, make any mention of the various bands of the Yankton, of their chiefs or of their populations. (Ibid, p. 103; Def. Ex. No. 26).

Later on he makes general comments about the Dakota bands as follows: "All of these thirty tribes, particularly those of the Titons, yield still other divisions which are

under the leadership of subordinate chiefs . . . If this nation had more insight and policy, it could form a chain that would render it yet more formidable to all its neighbors than it is. But their separation and mutual remoteness necessitated by their form of hunting which does not permit of their living together in too great numbers, divides interests and causes those of the St. Peters River, those of the River Mohens (Des Moines) and those of the Missouri to regard each other as strangers (Ibid, p. 104; Def. Ex. No. 26).

Another comment by Tabeau reveals his desire to see more of the Yankton settled on the Missouri River so that their trade could be better controlled: "Many Yincton tribes of the River of the Mohens could be induced to settle on the James River. Some of them have been already tillers of the soil and all are familiar with the hunt of the beaver, the deer, and other animals yielding peltries, with which this river is said to be well supplied. The only thing that holds them back is the high price of our merchandise; but this obstacle ought now to disappear if the trade of the River of the Mohens, of the St. Peters and of the Missouri has no longer but one and the same source." (With American ownership of Louisiana all Indian trade in this region would have been under their control). (Ibid, p. 169; Def. Ex. No. 26).

Speaking in general of the Sioux he states: "The assembled Sioux number at least four thousand men bearing arms, and with the exception of two weak tribes, who are tillers of the soil near the St. Peters River, all are migrating. Spring and summer they follow the cow over the vast prairies that separate the St. Peters River from

the Missouri and, in the autumn, they follow her still by approaching again with her the great rivers where each tribe fixes its winter encampment." (Ibid, pp. 101-102; Def. Ex. No. 26).

It is evident from the data cited above for the period of ca. 1794-1804 that the main body of the Yankton Dakota lived along the Upper Des Moines River. They apparently practised some agriculture and during the spring and summer months followed the migrating herds of buffalo over the prairies. In the fall they also hunted buffalo but spent the winter months in sheltered spots along this river in heavy groves of timber which sheltered them from the winds and provides wood for heating and cooking.

In the winter and spring months they combed the river banks of the east side of the Missouri River and its tributaries for beaver. They were obviously much dependent upon trade goods and their economy was linked to the white man's world for good.

Summary: The Yanktons Start to Move into Royce Area No. 410, (ca. 1794-1805).

The first definite evidence of Yankton occupancy of Royce Area No. 410 dates from 1794 when Jean B. Truteau met three lodges of this tribe who were with a much larger party of Teton Dakota above the mouth of the White river.

These Indians were from the Des Moines river and were only casually hunting in the area. By about 1804, at least one band of Yankton seems to have been spending at least the summer months around the mouth of the James river. The main body of the Yankton obviously

were still on the Des Moines river at this date. The Teton Dakota of the Brule group held most of Royce Area No. 410 at this time.

* * *

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DISTRICT

YANKTON SIOUX TRIBE,

Plaintiff,

v.

KENNETH NELSON, et al.,

Defendants,

STATE OF SOUTH DAKOTA,

Intervenor-Defendant.

Affidavit of Alan R. Woolworth

Civil No. 76-4066

I, ALAN R. WOOLWORTH, being duly sworn, hereby depose and say:

1. I am chief archeologist for the Minnesota Historical Society, St. Paul, Minnesota. My academic training as an undergraduate was in History and Anthropology. My graduate training has been in Anthropology. My areas of expertise are American Indian History, American Frontier History, Ethnohistory, and Historical Archeology. For more than twenty-five years, I have studied the native Indian peoples, the history, and archeology of Nebraska, South Dakota, North Dakota, Minnesota and western Iowa. During many of these years, my

wife, Nancy L. Woolworth, a professional historian, has worked with me on the same research projects. For more than twenty years, my employment has been in state historical societies in Nebraska, North Dakota, and Minnesota. During the past twelve years, I have been retained by the United States Department of Justice as an expert witness and ethnohistorian in four legal cases dealing with many of the Indian tribes of North and South Dakota. I have also been retained in the same capacity by two different Indian tribal groups. These cases have dealt with the following tribes of Indians: The Yankton Dakota; Sisseton & Wahpeton Dakota; Mandan, Hidatsa, and Arikara; and the Turtle Mountain Chippewa. In the course of my employment with the Minnesota Historical Society, I have spent much time studying and interpreting the history and culture of the Indian tribes of Minnesota, North and South Dakota. This research has led to the printing of several reports, which set forth the findings of my research. Further, I am the author of a report published in 1974 entitled: *Ethnohistorical Report on the Yankton Sioux.*

2. During the course of my research and professional experience, I have worked extensively with documents dealing with the history and culture of the Yankton Dakota tribe; the treaty of 1858 between these people and the United States; and other aspects of the history of this tribe. Further, I am well informed concerning the history and life style of the Yankton Dakota Indians in the period after 1859 when they moved to a reservation.

3. In the era from about 1794 to 1870, the Yankton Dakota followed the traditional culture and life style of

their ancestors, but they were influenced to a considerable degree by frequent contacts with neighboring tribes such as the Ponca who spent much of the year in permanent villages, and who cultivated extensive gardens of corn, beans, and squash in addition to hunting the buffalo and other game animals. The Yankton habitat is now described: This tribe occupied an area of parkland and grassland with highly glaciated terrain which held lakes, streams, and groves of deciduous trees around the lakes and along the streams. The heavily wooded bottomlands of the Missouri River, the tree lined courses of Choteau creek, Platte creek, and Lake Andes were highly important localized areas to the Yankton, particularly after the establishment of their 400,000 acre reservation in 1859. Thereafter, it became the permanent tribal home. The significance of these localities to the Yankton can be demonstrated by the fact that they applied specific place names to them. A few of them are listed hereafter: Pte Kdi inyanka (Buffalo returned running), Platte creek and vicinity; Pte ta tiyopa (Buffalo's gateway), Lake Andes and environs; Ihuga paha (Lookout hill), a hill near Lake Andes; Maga ska (White Swan), a Yankton village site near modern Pickstown, S.D.; Oyate sica (Bad Nation), a Yankton village site at the mouth of Choteau creek; and Nawiikciza wakpa (Jealous ones fighting creek, (Choteau creek).

4. The Yankton Dakota tribe followed a seasonal cycle of activities which was based upon regional natural resources, climatic conditions, and a profound understanding of the cycles and habitats of the plants and animals. Up to about 1870, they would plant their garden crops of corn, beans and squash in the floodplain of the Missouri, James, Vermillion, and other streams each spring. When

these crops had been hoed once or twice, and the corn was about knee high, they would venture out from their permanent winter villages located in the wooded river bottoms, and go on the summer buffalo hunt. On it, they would prepare dried meat and dried wild plant foods. On their return from this hunt, about mid August, they would harvest part of their corn crop. Also, they would carefully store away for winter use the food surpluses obtained in the summer months. After being in their permanent village sites until late fall, they would start out again on what was the winter buffalo hunt. Winter buffalo hides were valued for tipi covers and robes. Sometimes, the winter hunt would last until late January or into early February. Then, they would return to their villages and stored foodstuffs. Trapping, fishing through the ice, and local hunting would occupy them until the spring when it would be time to tap the soft maple and box-elder trees for sweet sap which was boiled down into a sugar. Spring hunts would be made for deer, and elk, but thousands of muskrats were speared, shot or trapped for their meat and furs. Then, it would be time to start another cycle of seasonal subsistence activities. Ca. 1870, large game was gone.

5. The economy of the Yankton Dakota in the southeastern South Dakota region from about 1794 to 1870 was based upon hunting, fishing, trapping the gathering of wild plants, and river bottom agriculture. Although the buffalo was undoubtedly the most important game animal to these people, it was by no means their only source of sustenance. Other game animals were elk, deer, antelope, bear, beaver, muskrat, porcupine, hare, and the cottontail rabbit. All of these species were valued as food sources, and for hides or furs. Ducks and geese, along

with cranes and other waterfowl, were hunted in the spring and fall at Lake Andes, and marshes of the region. The eggs of nesting waterfowl were also gathered. Fish of several species were speared, captured at weirs on streams leading into lakes, shot with the bow and arrow, and fished for in both summer and winter months. During the spring, fall, and winter, most able bodied males of the tribe trapped for animals such as the beaver, and muskrat in any available bodies of water. Other animals such as the mink and skunk were trapped along lakeshores or streams. Lake Andes and its environs were highly significant to the Yankton Dakota as a source of wild game, waterfowl, fish, and wild plant foods. This area also provided resources of wood and plant fibers for purposes other than food. After 1870, reservation resources became far more vital to them. Lake Andes and its wild plant foods, fish, and waterfowl were much used.

6. Various properties and uses of the wild plants of their region were well understood by the Yankton, and intensive sustained efforts were made to harvest them as they matured. When wild game was scarce, these resources were all that kept them from starvation. The historical record shows that the Yankton were in great want during the 1850's and 1860's, and at times in the 1890's. If government food rations were insufficient for their needs, and wild game was scarce, they were forced to rely upon their crops in the river bottoms, and the native plants, waterfowl, and fish to avert starvation. At times, even their gardens failed because of floods or droughts. Then, the food resources of the creeks, marshes and Lake Andes became even more vital for their survival. Fruits, roots, and berries, along with aquatic plants were used in the

never ending food quest. Many of these foods grew in lakes such as Lake Andes or on the marshy ground surrounding them. Major plant foods from these sources were: The Yellow Lotus or Water Chinquapin, which is a tuber growing in shallow lakes. Another tuber was called psincha by the Dakota. It also grew in shallow lakes or in marshy ground. Another aquatic plant was the Bulrush. The tender white part at the base of the stem was eaten raw, and the stems woven into mats. The Cattail plant was valued for its down which was used as a dressing for burns or scalds, as padding, and diapers for babies. The edible Arrowleaf grew in marshy conditions, and produced a tuber. Other sought after plants were the wild turnip or pomme de terre which was called tipsina by the Yankton. It was gathered in great quantities, dried and stored for winter use. Also much sought after was the "Indian potato" or mdo of the Dakota. Sugar could be made from the sap of boxelder trees which grew along prairie lakes or streams. Not all plants were used as human food sources. Some of them were valued for more utilitarian purposes. One of these was the Horsetail or scouring rush. It was used for cleaning cooking utensils, as a sandpaper in making wood bows, and eaten by horses and ponies. It likewise grew in shallow lakes. Marsh grass was also gathered from the margins of lakes, and nearby marshes. It was used to insulate tents and tipis for winter use, on the ground, as insulation, etc. Many trees and shrubs which grew around prairie lakes such as Lake Andes were used for many purposes by the Yankton Dakota. Of special significance was the Cottonwood tree. The inner bark was peeled and eaten in times of food shortages. Young branches and the upper branches of old

trees were a winter feed for horses. The dried bark made a fuel, as did the wood, and the buds served as a source of a yellow dye. The Willow tree in several varieties was common on the borders of lakes. The stems of this tree were peeled and made into baskets. Poles were used to make frames for sweat lodges and other shelters. Also, the wood could be used as posts or as a fuel. The Chokecherry tree produced fruit which was gathered in great quantities by the Yankton Dakota. Much of it was mashed and dried for winter use. The wood could be used to make bows and as fuel. The Green Ash tree produced shoots that were used for pipesteams, arrows, and bows. In modern times it was used for fence posts, corrals, and construction. Also, it made a good fuel, for winter needs. The Wild Plum tree bore fruit that was dried for winter use. Its branches could be used for ceremonial purposes. All of these species of trees characteristically border the shores of prairie lakes such as Lake Andes in the southeastern South Dakota region. Further, Lake Andes was the largest of the glacial lakes on the reservation, and it was valued as a communal resource by the Yankton Dakota tribe to recent times.

7. Approximately twenty-five species of ducks and several species of geese, along with other waterfowl such as grebes, and cranes used the waters and shoreline of Lake Andes from the remotest times. They followed the Missouri River flyway, and halted in the spring and fall migrations at Lake Andes as it was one of the few lakes in the region. Some of them nested and remained at the lake through the summer months. Most of these birds were hunted and eaten by the Yankton and other Dakota tribes whenever they were available. Eggs from nests were also

gathered and eaten. Fish were sought after by the Yankton as a supplemental food source. They were caught by fishing, spearing, with the bow and arrow, and in the traps or weirs. In springtime, spearing and weirs were used at the entrances and outlets of lakes such as Lake Andes to capture migrating fish. During the summer and winter, fishing with lines or spearing were common methods. Species sought out were bass, bullheads, buffalo fish, suckers, pickerel, sunfish, and perch. Suckers were split and smoked for winter use. The snapping turtle, and the box turtle were common in Lake Andes and were captured for food whenever possible. By far the most common mammal was the muskrat which was plentiful in lakes and marshy areas. It provided a food source for the mink, but was also sought after by the Yankton for its fur and meat. Muskrats were eaten in large quantities by the Yankton in both spring and winter. The otter was less common, but valued for its fur. Other mammals such as the skunk, badger, and fox frequented the borders of lakes such as Lake Andes in their quest for mice, rabbits, or other food. They in turn were pursued and eaten by the Yankton. The furs of most of these animals could also be traded to the white man for manufactured necessities.

8. Lakes are scarce in southeastern South Dakota, and on the Yankton Dakota reservation. Therefore, they were all the more important as sources of wild plant foods, wild game, waterfowl, and wood for the Yankton. These people could also pasture and water their horses at Lake Andes. Shallow lakes such as Lake Andes, had an abundant vegetation of erect or submerged plants which filled an important niche in the local ecosystem. Many of these plants provided foods for flocks of wild ducks, geese,

cranes, and other waterfowl. Some plants were also important food sources to animals such as the muskrat and turtles. Some of the more important aquatic plants were: crowfeet, milfoil, pondweed, hornwort, water lillies and duckweed. Also present were bulrushes and cattails. Other foodstuffs have been listed earlier.

9. The statements made in this document are accurate, and are based upon research into the lifestyle of the Yankton Dakota, and are consistent with all of the facts concerning the Yankton Dakota which have come to my knowledge. It is my professional opinion that they present a fair and objective view of the importance of Lake Andes to these native American people.

DATED this 22nd day of November, 1976.

Signed by: /s/ Alan R. Woolworth

STATE OF MINNESOTA)
) SS.
COUNTY OF RAMSEY)

Subscribed and sworn to before me by the said Alan R. Woolworth on this 22 day of November, 1976.

/s/ Helen Hedman Carlson
Notary Public

My Commission Expires: 1/2/77
(Affidavit)

EXHIBIT T

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DISTRICT

YANKTON SIOUX TRIBE,

Plaintiff,

v.

KENNETH NELSON, et al.,

Defendants,

STATE OF SOUTH DAKOTA,

Intervenor-
Defendant.

Affidavit of
Nancy L. Woolworth
Civil No. 76-4066

I, NANCY L. WOOLWORTH, being duly sworn, hereby depose and say:

1. I am a historian and ethnohistorian in the private research firm of Woolworth Research Associates. I received a bachelor of arts degree and a master of arts degree in American History from the University of Michigan in 1954 and 1959. I have lived among the Indian peoples on the Grand Portage Chippewa Indian Reservation in Minnesota during many field seasons. I have also conducted ethnohistorical research for many years on Indian tribes in North and South Dakota, and Minnesota for both native American groups, and for the United States Department of Justice. I have published my research findings on a number of these cases and have other studies in manuscript form.

2. The French explorer and trader Charles Le Sueur reported in 1700 that the Yanktons or "Hinkaneton" were

known as the "Village of the Red Stone Quarry." This was the famous Pipestone Quarry in southwestern Minnesota. From about this time onwards, the Yankton Dakota have told a legend about large animal tracks which led from Lake Andes to the quarry site or Canum oke. According to their belief, these tracks were made by the legendary underwater panther called Unktehi. Near the quarry, the tracks disappeared into a spring. Lake Andes went dry soon afterwards and the Yankton who were camping at the quarry believed that they could hear a strange tapping on stone. This legend was narrated by Joshua Feather, a Yankton Dakota. It shows that the Yankton were familiar with Lake Andes from a very early time period.

3. In 1794, the trader, J.B. Truteau met friendly Yankton on the Missouri River in the area south of the mouth of the White River. They were with a party of Teton Dakota and were hunting buffalo.

4. Between 1794 and 1858, the Yanktons lived in this area and traveled through it to visit the kindred Teton Dakota and to hunt buffalo. About 1802, the Pickstown area was known to the Yanktons as Winyan nunpapi or Double Woman. A hill near Lake Andes was called Ihuga paha; it was the lookout hill for the Yankton watching for buffalo who came to the lake to feed. The valley through which the buffalo came was called Pte ta-tiyopa or Buffalo gateway. The Yankton often hunted there until buffalo became scarce c. 1850.

5. In the 1850's buffalo became scarce east of the Missouri River. This forced the Yanktons to intensify their wild plant collections. Also, they began to farm

more. By 1853, semi-permanent villages were set up on both sides of the Missouri River near the James River, and above it. In 1857 an Indian Agent found a band of Yankton under the chief White Medicine Cow in the Pickstown area.

6. John P. Williamson came as a missionary to the Yankton in the late 1860's. At that time the Yankton were living in tipis, and all men were armed with guns or bows. They still were dependent on the buffalo for food and went on hunts of two or three months duration, once or twice a year.

7. In 1865, an investigative commission found that the Yankton had not been given the rations guaranteed by treaty. Emergency foods were given out to prevent starvation. They had no crops, and hunted when possible.

8. About 1869, William Welsh, a missionary, stated that there were about 2,500 Yanktons. Time and again in the past they had been in an "almost starving and hopeless condition. They were fed rations, had no large game on their reservation, and efforts were being made to have them farm. A claim was made that they wanted lands issued to them in severalty.

9. In January of 1869, the Dakota Territorial Legislature asked for relief for destitute Yankton Indians. They stated that: "... the condition of the Yankton and Lower Brule bands of Sioux Indians is such that ... immediate steps for their relief ought to be taken, they being in an almost starving condition."

10. Also in January of 1869, S.D. Hinman, a missionary, had been visited by some Yankton chiefs. He wrote: "They are like men praying for life. Their corn crop of

last Summer was a failure, and a large part of the year's annuities had been expended . . . during the year '67. . . . the prairies are burned and there are no buffalo. . . . So they are left without money, food, or game." One chief said his people were living on "bark and roots."

11. In the fall of 1869, William Welsh reported that Chief White Swan was settled opposite Fort Randall and was building a church. The young men were making hay and log cabins. They wished to be taught farming methods. Some lands on the Missouri River had been divided into 80 acre farms, but the President had not ordered that them be given out to the Yanktons, but this hindered them in fencing or building houses for their families. Their 400,000 acre reservation was not as suited to their needs for farming in that that there were only about 13,000 arable acres along the Missouri River and a few more thousand acres of farming land in the valley of Choteau creek, and another small creek. There were more than 350 Yankton families. Hence, the Military Reservation at Fort Randall should be used to provide more farming land for the tribe.

12. In 1872, Mr. Welsh was again with the Yankton Dakota. The band of Chief White Swan now had a chapel and school. Most of the Yankton men were anxious to work for wages; and many of them had built comfortable log houses, on lands which they hoped to obtain by allotment. Some of them had purchased horses, wagons, and household furnishings. They also wished for cattle and farms of their own. There was not one-half as much farming land as was needed on the reservation. Each man could obtain more land by leaving the reservation, becoming a citizen, and filing for a homestead. Still, there was

much high prairie land away from the Missouri River that could be used for flocks of sheep and herds of cattle and horses. Chief Mad Bull's band at the lower end of the Reservation had many patches of land and and small fields under cultivation in a traditional life style.

13. Late in 1871, another mission worker, named Henry H. Brooks, worked at the White Swan settlement, and remained over the winter. At that time, there were from 1,000 to 1,500 Yanktons in the vicinity. It is evident that they were continuing to follow the traditional habit of camping together in the wooded river bottoms to obtain shelter, water and firewood.

14. During the course of 1882, a man named Herbert Welsh visited the Yankton Dakota and recorded that houses and farms dotted the prairie as far as the eye could see. Many Indians had teams and wagons. Several houses were clean and well cared for. Some of them had hay ricks and gardens; and in a few instances, pigs and chickens. The more progressive people had good houses with single roofs and board floors.

15. Ten years later, in 1892, an elaborate report is available which noted that none of the Yankton had weapons for hunting. Most of them had a plowed field of some size where they raised corn and garden vegetables. Some of the Yankton had very nice farms. The total number of families was 558; the total population numbered 1,715 individuals. Of this number a total of 1,561 people were living on the reservation. The statement was made that "All members of this tribe have received their allotments of land in severalty." Under the Dawes Act of 1887, 1,484 allotments had been made. Under the Act of 1891, 1,128 allot-

ments had been made. Many of the latter allotments had been made to supplement those made under the Dawes Act. More than three-fourths of the people now lived on their allotments. They were gradually making farms. The old, traditional method of working together in bands was gradually giving way to the concept of each man working his own farm. Crops in 1891 had been exceptionally good, but those of 1892 had not been good because of a drouth. A total of 4,522 acres of farming land had been broken up for crops, but 561 acres had been newly broken. Therefore, only 3,961 acres had been available for cultivation recently. A somewhat ambiguous statement concerning rations of food was made. It stated that in 1892 rations amounted to about 20% of the amount required to support a workingman. The remainder of the food had to be obtained either by working on their farms, or by earnings in freighting or "other civilized pursuits." A small percentage of their living was obtained by "root gathering, etc. . . . when winter comes again it is probable that the old people will get even a larger share than now, so as to prevent actual want and a repetition of the distress that occurred two years ago. . . ." A plausible interpretation of this statement is that more than 20% of the Yanktons received regular rations of food, as the rations for women and children would have been less than those given to a man who performed hard physical labor each day. Also, it is evident that there had been a food shortage, and perhaps near starvation on the reservation as late as 1890.

16. A recent South Dakota historian, Dr. Herbert S. Schell, notes that the Yankton did not receive all trust patents to land around Lake Andes until 1904. A local writer who lived in the area prior to 1904, wrote about the Yank-

ton life style and manners in the region around Lake Andes:

> "When warm weather came in the spring and fall of the year, the Sioux would load their families on their light wagons, and haul posts to trade for something the settlers could offer; in the fall, grapes, plums and berries were often the trading stock of the Indians. Dogs were the best trading stock to the Indians . . ."
>
> " . . . The Indians used the bow and arrow as all guns were taken from them by the government to reduce danger of molesting settlers. They issued food and clothes such as shawls and overcoats, and when warm weather came they often traded these garments to the settlers. They lived in tents or teepes and used light horses with extra ponies and colts following the caravens. The children rode behind the driver on some hay and blankets. The mother, called a squaw, did most of the work of setting up the camp, pitching the tent and getting a fire started. The men would wade in the nearby lake (Lake Andes) hunting for duck or mudhen eggs and shooting ducks for camp food. It did not take them long to set up camp as usually the pots and cooking utensils were hanging on the outside of the wagon box. . . ."

White settlers began to move into the area and to purchase land from the Yankton in 1904. The same writer (Henry Van der Pol) recorded some incidents as follows:

> ". . . Then in 1904, an Indian named Sparrow Hawk died and his wife and daughter were induced to sell their land to the Lake Andes Townsite Company. (The proprietors were John W. Harding, H.F. Hunter, T.E. Andres and J.H. Arnold). This land was on Section four of White Swan Township and was immediately platted as a townsite. Lot sales for Lake Andes were held on May 18, 1904 at Lake Andes . . . "

According to Dr. Schell, the same type of land transactions continued around Lake Andes between 1904 and 1915.

18. In 1922, a crisis arose over alleged governmental tolerance of this method of land sale. Lewis Merriam investigated the situation and wrote a report for the Brookings Institute in 1928 which was called: *The Problem of Indian Administration.*

19. The Yankton Dakota have known of Lake Andes and the surrounding area from about 1700 A.D. It is tied to a legend which also relates to their sacred Pipestone Quarries in southwestern Minnesota. Since at least 1794 they were hunting buffalo along the Missouri River near their reservation site, which was granted to them in 1859. The buffalo became scarce in the area of the reservation by about 1850. Thereafter, the Yanktons became more dependent upon smaller game, and wild plant foods, much of which was found in or around Lake Andes. After passage of the Dawes Act of 1887, and the Act of 1891, lands began to be allotted to Yankton families. This process continued for a number of years, and lands were being allotted to them in the vicinity of Lake Andes as late as about 1904. The Indian Appropriation Act of 1892 contained a provision by which a Commission of three men was appointed to negotiate with the Indians of the Yankton tribe for the sale of surplus lands on the reservation. It would appear that the allottments made to Yankton under the provision of the Dawes Act of 1887 were held in trust by the government. From 1904 to 1915, white settlers purchased Indian lands around Lake Andes. Many mem-

bers of the Yankton tribe continued to follow traditional uses of the resources of Lake Andes to 1904 and afterwards.

DATED this 11/11/76 day of November, 1976.

Signed by: /s/ Nancy L. Woolworth

STATE OF MINNESOTA)
)
COUNTY OF RAMSEY)

Subscribed and sworn to before me by the said Nancy L. Woolworth on this 22 day of November, 1976.

/s/ Helen Hedman Carlson
Notary Public

My Commission Expires: 1/2/77

(Affidavit)

NO. 86-1436

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

YANKTON SIOUX TRIBE OF INDIANS,

Petitioner,

v.

STATE OF SOUTH DAKOTA, CHARLES MIX COUNTY, SOUTH DAKOTA AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS STATE OF SOUTH DAKOTA AND CHARLES MIX COUNTY, SOUTH DAKOTA

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QUESTIONS PRESENTED

1. Whether the Equal Footing Doctrine precludes the Yankton Sioux Tribe from obtaining aboriginal title to a navigable lake which had been held in trust by the United States for the state of South Dakota.

2. Whether the Treaty of April 19, 1858, 11 Stat. 743, clearly and definitely gave title to the bed of Lake Andes to the Yankton Sioux Tribe.

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SUMMARY OF THE ARGUMENT

The Yankton Sioux Tribe could not have gained aboriginal title to the bed of a

navigable lake which was, under the Equal Footing Doctrine, held in trust by the United States for the future state of South Dakota. The only way a bed of a navigable lake may be conveyed subsequent to the bed achieving this trust status is by a definite and clear statement evidencing the intent of the United States to convey.

In the case of Lake Andes, there is no clear and definite statement that the United States intended to convey the bed of that lake to the Yankton Sioux Tribe in the Treaty of 1858. The Treaty does not mention Lake Andes and the fact that ~~the~~ lake is within the outer boundaries of the territory that was established as the Yankton Sioux Reservation does not meet the test needed to overcome the Equal Footing Doctrine.

REASONS TO DENY THE PETITIONS

I. The Eighth Circuit Court of Appeals correctly decided that once the Equal Footing Doctrine went into effect, only the finding of a recognized exception to the Equal Footing Doctrine could destroy South Dakota's title to the bed of Lake Andes.

The Equal Footing Doctrine was developed to ensure that new states to the Union would not enter the Union on an unequal basis compared to the original thirteen colonies. Under the Equal Footing Doctrine there is a strong presumption that the United States holds the beds of navigable waters within the territories in trust for the future states and that, upon the admission of the various states to the Union, ownership of these beds is transferred to state jurisdiction. Pollard's Lessee v. Hagen, 44 U.S. 212, 222-223, 229 (1845); U.S. v. Oregon, 295 U.S. 1, 14 (1935); Montana v. United States, 450 U.S. 544 (1981). The two cases which are most factually similar to this case; Montana

v. U.S., supra, and United States v. Holt State Bank, 270 U.S. 49 (1926), make it clear that the Equal Footing Doctrine applies with equal strength in cases in which the navigable waterway in question is located within the boundaries of an existing or former Indian reservation. This Court in Montana v. U.S. thoroughly analyzed the existing case law and restated the rules that are to be applied. The firm presumption in favor of state jurisdiction over the beds of navigable waterways can only be defeated when necessary for the United States: "To perform international obligations, or to effect an improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes for which the United States hold the territory." 450 U.S. at 551, quoting Shively v. Bowlby, 152 U.S. 1 (1894).

The United States will not be found to have conveyed the beds of navigable waterways unless there is "some special duty or exigency" and the intention to convey this property must be "definitely declared or otherwise made plain" or expressed "in clear and especial words." Montana v. U.S., supra, at 554. Under these rules, the burden is on the Tribe to clearly establish that the United States affirmatively and expressly conveyed the bed of Lake Andes to the Tribe under some special duty or exigency or, in the absence of an express conveyance, that the United States has in some other way made its intention clearly known. The Tribe failed to meet that burden.

Montana v. U.S. and the cases upon which that decision is based admit of no argument that the Tribe could obtain aboriginal title to the bed of a navigable waterway which was being held in trust for South Dakota. This

issue was argued in the Petition for Rehearing of the Crow Tribe of Indians in Montana v. United States (see Appendix) but the petition was denied. Montana v. United States, 452 U.S. 911 (1981).

In the case of Lake Andes, the evidence before the Eighth Circuit was that the Yankton Sioux Tribe did not begin migrating into the area which later became the Yankton Sioux Reservation until around 1810, only 48 years before the treaty was signed. This migration occurred seven years after the Louisiana Purchase, the time at which the United States began holding Lake Andes in trust for what was to become South Dakota. Since the Tribe did not obtain aboriginal title to the lake bed prior to 1803 South Dakota's title cannot be overcome unless aboriginal occupation can overcome the Equal Footing Doctrine.

None of the cases cited by the Tribe to support the argument that aboriginal title can be gained after the Equal Footing Doctrine has become effective are convincing. First, to the extent they conflict with Montana v. U.S. they are wrong. Second, none of the cases clearly establish that aboriginal title was gained after the Equal Footing Doctrine was in effect. The Tribe claims that in Turtle Mountain Band of Chippewas v. United States, 43 Ind.Cl.Comm. 251 (1978) aboriginal title was specifically found to extend to the beds of navigable waters and that the aboriginal title ripened after the United States acquired sovereign title. In fact, quite the opposite occurred. The Indian Claims Commission specifically did not award any compensation for the acreage found to be under navigable waters. That decision can only be ascribed to the fact that the Commission believed that the

Chippewas did not own the lake or river beds. Had the Chippewas owned the beds of these navigable waters they would have been entitled to compensation for the taking of those beds. Nowhere in the lengthy decision is there language supporting the argument of the Tribe on this issue. Turtle Mountain Band of Chippewas v. United States, 43 Ind.Cl.Comm. 251 (1978). The cases of United States v. Romaine, 255 F. 253 (9th Cir. 1919) and Heckman v. Sutter, 119 F. 83 (9th Cir. 1902) provide no guidance because in neither case was the date of attachment of aboriginal title litigated and therefore it is impossible to determine when aboriginal title became effective.

The law on this issue is clear; aboriginal title cannot be gained where the United States has begun holding the land in trust for future states. The only way a tribe can obtain title to navigable waterways

is for the United States to make its intentions to convey the title clear by express words in a treaty or through some special duty or exigency as was found in the case of Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

II. The Treaty of 1858 never expressly mentioned a conveyance of the bed of Lake Andes.

To avoid the strong presumption against conveyance, the intention of the United States to convey a lake bed must be made in clear and definite terms. The Tribe can point to no such terms in the Treaty of 1858, 11 Stat. 743.

The Tribe did not argue this issue below notwithstanding its allegation in footnote 9 of its Petition. The Tribe's argument below was that since the United States did not explicitly extinguish the Tribe's aboriginal title in the treaty, it therefore recognized the Tribe's title. This argument presupposes

that the Tribe already had aboriginal title. Since the proceeding section demonstrated that the Tribe never had aboriginal title to the bed of Lake Andes, this argument must also fail.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

THE STATE OF MONTANA, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA AND
THE CROW TRIBE OF INDIANS, MONTANA,
Respondents.

PETITION FOR REHEARING

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. 79-1128

THE STATE OF MONTANA, ET AL.,
Petitioners,

v.

THE UNITED STATES OF AMERICA AND
THE CROW TRIBE OF INDIANS, MONTANA,
Respondents.

PETITION FOR REHEARING

Respondent, the Crow Tribe of Indians, respectfully petitions this Court for a rehearing of its decision entered on March 24, 1981. An extension of time to May 8 within which to file this petition was granted on April 13 by Justice Stewart.

Rehearing is requested because the Court did not settle one critical aspect of the Big Horn riverbed--it did not mention the Tribe's aboriginal title to it, which unless and until this Court says otherwise, is protected

by a large and consistent body of precedent followed for as long as this Court has sat. Presumably the Court would not intend such a protected title to be extinguished without at least some discussion of the protecting precedents.

The Court's opinion poses as the only ownership question in this case "whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the Treaties of 1851 or 1868" (emphasis added). Slip op. at 4. But no matter how that question is decided, it would not be relevant to the Tribe's aboriginal title to the riverbed, which does not arise from conveyance to the Tribe. The Court did deal with the Tribe's treaty title, and held the 1851 and 1868 treaties did not convey the bed to the Tribe. But even if the State acquired the fee to the riverbeds in the Crow Reservation, that fact does not, under the

precedents, extinguish the Tribe's aboriginal title to them.

The Tribe's aboriginal title was mentioned in our brief (pp. 9-11, 17), but not elaborated because it is of course eclipsed by the Tribe's more powerful 1868 treaty title, which was naturally the primary object of all three parties' attention. But if treaty title is peeled off, as it was by the Court's opinion, then the Tribe's underlying aboriginal title is exposed to view and must be dealt with.

If this Court does not deal with the Tribe's aboriginal title at this time, years of further litigation is inevitable, not only for the Crows, but for all other tribes

through whose reservations run navigable streambeds.[1]

I. The Tribe Had Aboriginal Title Before the United States Was Formed.

The Crows had aboriginal title to the land encompassed by their present reservation before the United States was formed, and ever since.[2]

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[1]Even if the Big Horn is legally "navigable," it is a shallow stream fit only for small boats, and bears no commercial traffic. In the 1870s it was not considered navigable in fact.

[2]The Indian Claims Commission has found that the Crows' territory described in the 1851 treaty (which includes the Crows' present reservation) was "held by them by aboriginal title." Crow Tribe v. United States, 3 Ind.Cl.Comm. 147, 151 (1954). The Commission cited the 1868 Treaty Commissioners' report that "These Indians have never founded the title to their lands upon the treaty of 1851. They have looked upon that treaty as a mere acknowledgement of a previously existing right in themselves." At p. 163. This Court has held likewise. United States v. Northern Pac. R. Co., 311

(Footnote Continued)

The theory of aboriginal Indian title, and its relationship to European concepts of title, is based on international law, as elaborated by the Court in several early opinions. E.g., Mitchel v. United States, 34 U.S. 711, 745-53 (1835); Johnson v. McIntosh, 21 U.S. 543, 572-84 (1823); generally, see Cohen, Federal Ind. Law 291-4 (1942). In the Americas, discovery gave the European powers control over the territory claimed against each other but not against the Indian tribes. The aboriginal Indian title--sometimes called a right of possession or occupation--was respected until extinguished by purchase or by just wars. Mitchel, supra, 34 U.S. at 745-46. Until so extinguished, it was good

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(Footnote Continued)
U.S. 317, 398 (1940) ("The fee of all this territory [Crows', among others] was in the United States, subject to the Indian right of occupancy").

against all the world except the new sovereign. Id.; Oneida Indian Community v. County of Oneida, 414 U.S. 661, 668 (1974); United States ex rel. Hualpai Indians v. Santa Fe Pac. R. Co., 314 U.S. 339, 345 (1941) (hereinafter the "Santa Fe" case). While the United States owns the underlying fee, it will only "take effect in point of possession when their [the Indians'] right of possession ceases." Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

These rules were absorbed into our law upon independence. Johnson, supra, 21 U.S. at 584-89. Under the Constitution, the sole right to extinguish aboriginal Indian title was vested in the national government. Oneida, supra, 414 U.S. at 667.

The doctrine of Indian title was accommodated to the land tenure forms of the common law by characterizing the underlying

ownership of the land as ownership of the fee, subject to the aboriginal Indian title.

> "Their [The Indians'] right of occupancy has never been questioned, but the fee in the soil has been considered in the government." Worcester v. Georgia, 31 U.S. 515, 580 (1832); Northern Pacific, supra, 311 U.S. at 398, quoted in note 2 above.

In the original thirteen States, the fee underlying Indian lands is usually owned by the States, as the Court established in Fletcher v. Peck, 10 U.S. 87, 142-43 (1810); see Oneida, supra, 414 U.S. at 670-71. In the West, the fee underlying Indian lands is usually owned by the United States. In either case the underlying fee may be conveyed to a private party, Fellows v. Blacksmith, 60 U.S. 366 (1856); Mitchel, supra, 34 U.S. at 745-46, but in all cases federal law protects the aboriginal Indian title until lawfully extinguished under federal authority. Oneida, supra, 414 U.S.

at 668-69; Fellows, supra. Until extinguished, the aboriginal Indian title is "as sacred as the fee simple of the whites." Mitchel, supra, 34 U.S. at 746; Santa Fe, supra, 314 U.S. at 345; Oneida, supra, 414 U.S. 669.

A tribe's aboriginal title exists without reference to any recognition or grant from the United States.

> ". . . a tribal right of occupancy, to be protected, need not be 'based upon a treaty, statute, or other formal government action.'" Oneida, 414 U.S. at 669, quoting from Santa Fe, supra, 314 U.S. at 347; also Cramer v. United States, 261 U.S. 219, 229 (1923).

When a tribe cedes some of its aboriginal lands under a treaty, and retains the balance, and the United States recognizes and guarantees the Indians' title to the balance (as is common and as happened with the Crows in 1868), the only thing "conveyed" by the United States to the tribe is

protection of the tribe's preexisting, aboriginal Indian title against an uncompensated taking by the United States itself. United States v. Sioux Nation, 48 U.S.L.W. 4960, 4972 n.29 (1980). In all other title respects, the treaty only confirms to the tribe what it already had. United States v. Winans, 198 U.S. 371, 381 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of rights from them--a reservation of those not granted"), cited in Washington v. Fishing Vessel Assn., 443 U.S. 658, 678 (1979) and United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978).

II. The Crows' Aboriginal Title Included the Streambed

The Crows' aboriginal title to their territory (including what later became their 1868 reservation) was established well before the United States acquired ownership of the underlying fee (Louisiana Purchase, 1803),

and so it cannot rationally be argued that any part of the Crows' territory, e.g., the streambed, was excluded from the boundaries of that title prior to acquisition of the fee by the United States.

Aboriginal title does not depend on actual use of every part of the territory claimed, Kootenai Tribe v. United States, 5 Ind.Cl.Comm. 456, 473-74 (1957); Coeur d'Alene Tribe v. United States, 4 Ind.Cl.Comm. 1, 20-23 (1955), but even so, the Crows aboriginally did use the Big Horn River. See Winters v. United States, 207 U.S. 564, 576 (1908) ("The Indians had command of the lands and the waters--command of all their beneficial use . . ."). Not only was it an integral part of the Tribe's religious tradition and ceremonial life, e.g., III J.App. 193; I J.App. 97-98, but the river's fish was a supplement to the Crows' main diet of buffalo, I J.App. 39, 58-59.

Their language contained words for fish and fishing, I J.App. 34, 58-59, an activity they performed using hooks made from bones, or spears, or fishtraps, I J.App. 97. Originally, they caught native species of catfish, ling and cutthroat trout, I J.App. 83.

The 1851 Treaty of Fort Laramie, 11 Stat. 749, was the first formal recognition of this activity. Article 5 stated that the Tribe intended, among other things, to maintain their right to fish:

> "It is . . . understood that . . . the aforesaid Indian nations do not . . . surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described."

Treaty Commissioner D. D. Mitchell said on the first day of negotiations that the treaty was

> ". . . not intended to . . . destroy your rights to hunt, or fish, or pass over the country, as heretofore." (Emphasis added)

Crow Tribe v. United States, 284 F.2d 361, 367 (Ct. Cl. 1960).

This treaty set aside a reservation of 38 million acres for the Crow Nation, including the River Crows, who were "addicted to . . . the pleasures of fishing." Crow Nation v. United States, 81 Ct. Cl. 238, 278 (1935).

Further, the Act of 1882, 22 Stat. 42, under which the Tribe ceded land, expressly provided that the diminished reservation should include existing fishing areas. II J.App. 175. The Commissioner of Indian Affairs instructed Felix R. Brunot, Chairman of the Special Commission assigned to negotiate the treaty, to

> ". . . include such fisheries as may be of value to the Indians as a means of furnishing them with supplies of food." II J.App. 100.

Water, in general, and the Big Horn River in particular, occupies even today a central position in the life and beliefs of

the Crow people. The traditional Crows believe that people were created from a mixture of riverbed mud and water. Water, which is one of nature's most powerful forces, with the ability to give and take life, is used in every traditional religious ceremony. Through the continuation of old customs such as "feeding" the Big Horn River in annual ceremonies, the Crows show their respect for the river and keep faith with the supernatural relevation, as related by Henry and Lloyd Old Coyote, to Big Metal after he had received his powers. The Big Horn River was so named by the Crows, and they have a traditional song dedicated to the River.

The Big Horn River--an integral part of the Crows' land, culture and language--is the very heart of the Crow people. The Crows' aboriginal use and occupancy of their land embraced the river, and they have continued that use to the present time.

III. Aboriginal Title May Not Be Extinguished or Interfered With By Any Authority Other Than That of the United States

In Worcester v. Georgia, supra, 31 U.S. at 558, this Court referred to the

> ". . . universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary line, established by treaties: that, within their boundary, they possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States."

This is the reason why the Montana Statehood Act in 1889, 25 Stat. 677 (also

Mont. Code Annot. Ord. No. 1) provided that the people of the State:[3]

> ". . . forever disclaim all right and title . . . to all lands lying within [the State] . . . owned or held by any Indian or Indian tribes. . . ."

In other words, nothing Montana has done or could do would extinguish the Crows' aboriginal title. If there has been an extinguishment, it could only be by the hand of the United States.

IV. The United States Has Never Extinguished the Crows' Aboriginal Title

We are not aware of any argument that can be made that the United States has ever acted to extinguish the Crows' aboriginal

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[3]Similar language appeared in the Montana Territorial Act, 13 Stat. 85 (1864). See also the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §§ 1311-1315, which granted all federal lands beneath navigable waters to the States but expressly excepted Indian-owned beds. 43 U.S.C. § 1313(b).

title, especially in light of the policy declared by this Court that it would take "plain and unambiguous action" to deprive the Indians of their aboriginal rights. Santa Fe, supra, 314 U.S. at 346 and 354; see Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968).

The mere conveyance to the State by the United States of its underlying fee title would not extinguish the Indians' aboriginal title. Beecher v. Wetherby, 95 U.S. 517, 526 (1877) (when Congress granted land in fee to Wisconsin, the State took "subject . . . to the existing occupancy of the Indians so long as that occupancy should continue"), cited and quoted with approval, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955). See also Buttz v. Northern Pac. Railroad, 119 U.S. 55 (1886) (Congressional grant of fee to railroad did not give the railroad the right to interfere with the Indians' aboriginal

title; accord, Santa Fe, supra, 314 U.S. 339 and United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938) ("Grants of land subject to the Indian title by the United States which had only the naked fee, would transfer no beneficial interest"); Johnson v. McIntosh, supra, 21 U.S. at 592 (Georgia, even though it owned the fee, could not convey title free of the Indians' right of occupancy).

Given this Court's decision that the United States granted the beds of navigable streams in the Crow Reservation to Montana when it became a State, this certainly would not operate to divest the Tribe's underlying aboriginal title, according to this Court's decisions in the above-cited cases. Accordingly, the Crows have "a legal as well as just claim to retain possession of it, and to use it according to their own discretion." Johnson v. McIntosh, supra, 21 U.S. at 574.

Nothing in United States v. Holt State Bank, 270 U.S. 49 (1926), is inconsistent. In that case the tribe had ceded its interest--aboriginal as well as treaty title--in the Mud Lake area in 1889, thus terminating any reservation. The question of lakebed ownership did not arise under after the lake was drained and the area settled by white farmers. The termination of the Chippewa Reservation is a controlling factual distinction from the Crow case, where the reservation is still intact and under the governance of the Crow Tribe, and mostly still owned by the Tribe or its members.[4] No

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[4]Other differences between this case and Holt State Bank are: There the tribe had no express treaty reservation, and the Minnesota Statehood Act had no express protection of Indian property. Interestingly, in Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), as in Holt State Bank, the body of water was no longer part of an Indian reservation, yet the

(Footnote Continued)

Tribe should be able to claim surviving aboriginal rights to an area it has ceded or voluntarily abandoned. See Santa Fe, supra, 314 U.S. at 357-8.

In Choctaw, supra, and Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), cases where this Court held that the tribes owned the beds (and which this Court reaffirmed in the instant case), the Indians did not have aboriginal title to their statutory reservations. They emigrated to the new reservations Congress established for them. Therefore, whatever rights they had did depend on what Congress gave them. Here, the Crows already had aboriginal title to their land, including the streambed, so that

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(Footnote Continued)
Choctaws were held to still own it, unlike the Chippewas. The consistency between those cases and the instant one is difficult to see.

their treaties gave them nothing more than they already had (except the right to be compensated for any future taking, a valuable right but not relevant here). As this Court has stated,

> ". . . the treaty was not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905); cited in Washington v. Fishing Vessel Assn., 443 U.S. 658, 678 (1979) and United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978).

CONCLUSION

Rehearing should be granted in order to dispose of the question whether the Crows still have aboriginal title to the streambed, as surely they do unless and until the precedents protecting that title are at least discussed. The opinion should be withdrawn

and the case set for reargument on the aboriginal title question.

Respectfully submitted,

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Counsel for the
Crow Tribe

May 8, 1981

(3)

No. 86-1436

In the Supreme Court of the United States

OCTOBER TERM, 1986

YANKTON SIOUX TRIBE OF INDIANS, PETITIONER

v.

STATE OF SOUTH DAKOTA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Yankton Sioux Tribe holds aboriginal title to the bed of Lake Andes, a navigable body of water in South Dakota.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 796 F.2d 241. The prior opinion of the court of appeals is reported at 683 F.2d 1160. The opinion of the district court (Pet. App. 9-33) is reported at 604 F. Supp. 1146, and the prior opinions of the district court are reported at 566 F. Supp. 1507 and 521 F. Supp. 463.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1986, and a timely petition for rehearing was denied on November 7, 1986 (Pet. App. 34).

On January 29, 1987, Justice Blackmun extended the time within which to file the petition for a writ of certiorari to and including March 9, 1987. The petition for a writ of certiorari was filed on March 4, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the title to the bed of Lake Andes, a shallow, navigable water body of approximately 4,000 acres in South Dakota. Lake Andes lies within the exterior boundaries of the Yankton Sioux Indian Reservation, which was established by the 1858 Treaty with the Yankton Tribe of Sioux, 11 Stat. 743 (Pet. App. 35-46). In 1803, the United States acquired sovereignty over the lands at issue by the Louisiana Purchase. In the years following 1803, the Yankton Sioux began moving into the general area in the vicinity of Lake Andes. Pet. 5. In Article I of the 1858 Treaty, the Tribe ceded and relinquished to the United States all of the lands claimed by them "except four hundred thousand acres thereof" (Pet. App. 36). The exterior boundary of this reservation was described in Article I, and Lake Andes falls within that boundary.

The State of South Dakota was admitted into the Union by the Act of February 22, 1889, ch. 180, 25 Stat. 676. Several years thereafter, in 1892, the United States and the Tribe entered into a cession agreement, which was later ratified by Congress as part of the Indian Department Appropriations Act of 1894, ch. 290, § 12, 28 Stat. 314-319. Article I of the Cession Agreement stated that the Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and

to all the unallotted lands within the limits of the reservation set apart to said Indians [by the 1858 Treaty]" (28 Stat. 314). In return, Article II provided that "[i]n consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000)" (28 Stat. 315).

2. The Lake Andes Migratory Waterfowl Refuge was established by Executive Order No. 7292, dated February 14, 1936, "in order to effectuate further the purposes of the Migratory Bird Conservation Act (45 Stat. 1222) * * *." In the following years, the Fish and Wildlife Service began to acquire property interests to allow it to control and manage Lake Andes as part of the Refuge. In 1939, the State of South Dakota and the United States executed an agreement by which the State, which had asserted title to the lakebed, granted the United States an exclusive and perpetual right to operate and maintain the lakebed for migratory waterfowl and wildlife conservation purposes. Pet. App. 11-12. Since that time, Lake Andes has been managed by the Fish and Wildlife Service (or its predecessor agencies) in the Department of the Interior as the most important component of the Refuge.

3. In the summer of 1976, the bed of Lake Andes was dry and had become covered with vegetation. Three non-Indians obtained permits from the State and began to harvest kochia (fireweed) from the bed. The Tribe then initiated this action in the United States District Court for the District of South Dakota against the non-Indians, alleging that they were trespassing upon Indian lands. Subsequently, the

State and Charles Mix County intervened as defendants, the individual defendants were dismissed from the suit, and the case proceeded, in essence, as a quiet title action. Pet. App. 3, 12.

On September 19, 1981, the district court entered summary judgment in favor of the Tribe. *Yankton Sioux Tribe* v. *Nelson*, 521 F. Supp. 463. The court ruled that the Tribe held aboriginal title to the lakebed prior to the 1858 Treaty, that its aboriginal title was not expressly extinguished by the United States, and that, for this reason, title to the lakebed had not passed from the United States to the State, under the Equal Footing Doctrine, upon its admission to the Union. See Pet. App. 3-4.

The court of appeals vacated the district court's judgment and remanded the case without resolving the merits. 683 F.2d 1160 (1982). Rather, noting that the parties were advancing conflicting theories of ownership that depended upon whether Lake Andes was navigable at various times, the court of appeals instructed the district court to make findings concerning the navigability of the Lake at the time of the 1858 Treaty and at the time South Dakota was admitted to the Union in 1889. See Pet. App. 4.

4. On remand, the district court found that Lake Andes was navigable in law and in fact at the relevant times and again entered judgment in favor of the Tribe. 566 F. Supp. 1507 (1983).

In September 1983, while post-judgment motions were pending before the district court, the United States moved to intervene as a plaintiff. The motion to intervene was accompanied by a proposed complaint and cross-claim, in which the United States asserted a property interest in the bed of Lake Andes

free from any beneficial interest of the Tribe.[1] The intervention motion was granted by the district court (Pet. App. 12-13), which then again entered judgment in favor of the Tribe (*id.* at 9-33).

Relying upon the judgments entered in two actions brought by the Tribe against the United States pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. (1976 ed.) 70 *et seq.*, in which the Tribe had recovered awards relating to the lands that it ceded in the 1858 Treaty and the 1892 Cession Agreement, the court first held that the United States was barred by the doctrine of collateral estoppel from contesting the Tribe's claim of aboriginal title to the lakebed as of 1859 (Pet. App. 15-18). The court further held that the Tribe's title to the lakebed had not been extinguished by events other than the 1858 Treaty or the 1892 Cession Agreement, including the United States' establishment and maintenance of the Wildlife Refuge, and that the Tribe had not voluntarily abandoned its beneficial ownership of the lakebed (Pet. App. 18-26). On these grounds, the court concluded that "[t]he Yankton Sioux Tribe of Indians owns the bed of Lake Andes" (*id.* at 33).

5. The State, the County and the United States appealed. The State and County argued that the State had acquired unencumbered title to the lakebed under the Equal Footing Doctrine upon South Dakota's admission to the Union and, in the alternative, that any interest that the Tribe might have had

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[1] The United States did not request any determination of the status of its interests vis-a-vis those of the State, nor has the State ever requested any such determination. Hence, the question whether the State or the United States has the better claim to the lakebed is not at issue in this case.

in the lakebed was extinguished by the 1892 Cession Agreement. Although the United States had supported the State's Equal Footing Doctrine argument in district court, it did not renew that argument on appeal.[2] Instead, the United States contended that the 1892 Cession Agreement had extinguished any interest the Tribe might have had in the lakebed and that the United States was not collaterally estopped from challenging the Tribe's claims of ownership.

The court of appeals reversed (Pet. App. 1-8). The court held that, under the Equal Footing Doctrine, the United States, upon acquiring the Louisiana Territory, immediately began to hold lands underlying navigable waters within the acquired territory, including Lake Andes, in trust for future States (Pet. App. 4-5). The court found that the Tribe's aboriginal title in the area did not attach until after it was acquired by the Louisiana Purchase (*id.* at 7), and it held that such a claim of aboriginal title arising after the United States acquired the territory in question cannot defeat the State's title. In the court's words: "Even assuming that aboriginal title can ever attach to the bed of navigable waters, we hold that when sovereign title is in place and operation of the equal footing doc-

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[2] The United States urged that the case instead should be resolved on the "narrow ground" that the 1892 Cession Agreement extinguished any interest the Tribe might have had. The United States further stated: "[W]e note that the Equal Footing Doctrine argument is one that is most appropriately raised by a state itself, rather than by the United States, and that the State of South Dakota is in fact ably making that argument in its own appeal. Hence, there is no need here for the United States to repeat that same argument on its own behalf." U.S. Br. 22 n.14.

trine begins before any claim of aboriginal title has ripened, the state's claim of ownership is preeminent unless a recognized exception to the equal footing doctrine is applicable" (*id.* at 7). Finding no conveyance of the lakebed to the Tribe that was either "explicit or clearly inferrable from the circumstances" (*ibid.*, citing *Montana* v. *United States*, 450 U.S. 544, 551-552 (1981), and *United States* v. *Holt State Bank*, 270 U.S. 49, 54-55 (1926)), the court concluded that the lakebed passed to the State of South Dakota in 1889 under the Equal Footing Doctrine (Pet. App. 7-8). The court therefore found it unnecessary to address any of the other issues presented (*id.* at 8).

ARGUMENT

The court of appeals' conclusion that the Yankton Sioux Tribe holds no present ownership interest in the bed of Lake Andes is correct, and its decision presents no question of general importance warranting review by this Court.

1. The United States has managed Lake Andes as the principal component of the Lake Andes National Wildlife Refuge for almost 50 years. In the court of appeals, the appellants made two independent arguments concerning ownership of the bed of Lake Andes, either of which would fully sustain the United States' right to continue to manage the Lake and its bed as part of the Refuge and would, correspondingly, defeat the Yankton Sioux Tribe's claim of aboriginal title to the lakebed.

First, the United States and the State argued that the Tribe had ceded any interest it had in the lakebed to the United States in the 1892 Cession Agreement. That Agreement necessarily conferred on the

United States, at least as against the Tribe, the right to exercise complete control over the lakebed for wildlife conservation or other purposes. Second, the State argued that the Tribe did not have aboriginal title to the lands prior to the Louisiana Purchase in 1803; that after 1803, the United States held the bed in trust, to be conveyed to the future State of South Dakota under the Equal Footing Doctrine; and that aboriginal title could not attach during this period in a manner that would defeat the State's claim under the Equal Footing Doctrine after statehood. Because the State thereafter granted the United States a permanent easement to enable it to maintain Lake Andes as part of a wildlife refuge, the United States succeeded to any interests the State acquired under the Equal Footing Doctrine to the extent necessary to assert control over the lakebed for refuge purposes. Accordingly, under this second argument as well, the Tribe's claim of aboriginal ownership would be defeated.

The United States did not rely in the court of appeals on the second rationale just discussed, but the court of appeals nevertheless adopted it. See pages 6-7 and note 2, *supra*.[3] This rationale presents novel theoretical issues regarding the interrelationship between a State's rights under the Equal Footing Doctrine and a tribe's claim of aboriginal title

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[3] The court of appeals determined as a factual matter that the Tribe's exclusive occupancy of the area did not begin until after the Louisiana Purchase in 1803 (Pet. App. 6-7). That fact-bound holding does not warrant review by this Court. In any event, the Tribe concedes that "[t]he United States acquired sovereign title to the area in 1803 before the Tribe's use of the area had ripened into aboriginal title" (Pet. 5 n.2).

that attached to the same submerged land after the United States acquired the territory. Petitioner Yankton Sioux Tribe appears to acknowledge that its aboriginal claim, whenever it attached, would not actually defeat the State's *fee title* to the lakebed under the Equal Footing Doctrine, and that the Tribe therefore would have no more than the traditional aboriginal right to use or occupy the lakebed until that right was extinguished by the United States. See Pet. 6-8. Accordingly, as the Tribe suggests (Pet. 7), it might be legally possible for the courts to recognize both the Tribe's aboriginal claim and the State's fee-title claim to the same lakebed.

It might also be that the Tribe is correct that an absolute rule that aboriginal rights can *never* attach to lands underlying navigable waters after the United States acquired the territory would go too far. Thus, we may assume for present purposes that if a tribe moved into a new area on the public domain, the tribe, after the passage of an appropriate period, might be held to have acquired a new homeland on the public domain. By the same token, the United States might be held to have sufficiently acknowledged that new home by some official act. In that event, it would not be unreasonable to conclude that some or all of the tribe's aboriginal rights had been effectively transferred to the new location. And in appropriate circumstances, it is possible that this aboriginal right in turn might extend in some measure to a navigable body of water and its underlying bed—at least if the water body was sufficiently central to the tribe's way of life at the new location and was regarded as such by responsible federal officials. Cf. *Montana* v. *United States*, 450 U.S. at 556.

Even then, however, it would be necessary to reconcile the respective interests of the tribe and the State in order to define the nature and extent of such aboriginal rights, if any, that were thus acquired and that were later retained by the tribe when the fee title to the bed itself passed to the State upon its admission to the Union.

There is, however, no need for the Court to address these difficult theoretical and factual issues in this case. Questions concerning the recognition of aboriginal rights in lands underlying navigable waters have arisen only rarely in the lower courts. Moreover, as the State argues (Br. in Opp. 7-8), and as the Tribe concedes (Pet. 7-8 nn. 4-5), the Eighth Circuit's treatment of those issues in this case does not directly conflict with the appellate decisions petitioner cites (Pet. 7-8)—*Turtle Mountain Band of Chippewa Indians* v. *United States*, 490 F.2d 935 (Ct. Cl. 1974); *United States* v. *Romaine*, 255 F. 253 (1919); and *Heckman* v. *Sutter*, 119 F. 83 (1902)—because the question whether aboriginal title ripened after the United States acquired the territory was not actually litigated in those cases. See also *United States* v. *Pend Oreille Cty. Pub. Util. Dist. No. 1*, 585 F. Supp. 606, 608 (W.D. Wash. 1984), quoted at Pet. 12 ("The courts have never squarely addressed the question of the competing claims to the same navigable waters by an Indian tribe and a state, where the Indian claim is based on aboriginal title."). Finally, we submit that resolution of the issues the Eighth Circuit chose to address is unnecesary to the outcome of this case, because, as we explain below, the United States' right to control Lake Andes and its bed, to the exclusion of the

Yankton Sioux Tribe, is in any event secured by the 1892 Cession Agreement.

2. a. Article I of the 1892 Cession Agreement states that the Indians "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to *all the unallotted lands* within the limits of the reservation set apart to said Indians [by the 1858 Treaty]" (28 Stat. 314 (emphasis added)). The bed of Lake Andes, of course, consisted entirely of unallotted lands. Hence, under the plain language of Article I, whatever interest the Tribe might once have had in the lakebed passed from the Tribe to the United States in 1892. Several considerations reinforce the conclusion that the explicit text of Article I should be given its natural effect of defeating any continuing claim of title by the Tribe.

First, Article I is framed in terms that this Court has repeatedly characterized as "express language of cession." *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, No. 83-2148 (July 2, 1985), Slip op. 15 n.19; *Solem* v. *Bartlett*, 465 U.S. 463, 469 (1984). In *DeCoteau* v. *District County Court*, 420 U.S. 425, 445 (1975) (emphasis added), this Court, in considering a similar and contemporaneous cession agreement, found that the same language was "precisely suited" to the purpose of conveying to the United States, "for a sum certain, *all* of [the Indians'] interest in *all* of their unallotted lands."

Second, the retention of the lakebed by the Tribe would have been inconsistent with the purposes of the 1892 Cession Agreement. Those purposes consisted not only of opening additional lands for non-Indian settlement, but also of paving the way for the anticipated end of the tribal way of life. As this

Court stated in *Solem* v. *Bartlett* (465 U.S. at 468 (footnote omitted)):

> Another reason why Congress did not concern itself with the effect of surplus land acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, members of Congress voting on the surplus land acts believed that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist.

Finally, there is nothing in the extensive legislative history of the 1892 Cession Agreement to indicate that the parties intended that the Tribe would retain any ownership interest in the bed of Lake Andes. See S. Rep. 196, 53d Cong., 2d Sess. (1894); H.R. Rep. 570, 53d Cong., 2d Sess. (1894); S. Misc. Doc. 134, 53d Cong., 2d Sess. (1894). If such an exception had been intended, it is reasonable to expect some mention of that fact in the account of the negotiations contained in the legislative history.

b. The Tribe cites (Pet. 9-10) several post-1892 statutes that it believes support the contention that it owns the lakebed. Those statutes, however, do not support the Tribe's position. In 1896 and 1906, Congress passed two measures appropriating funds for the purpose of enabling the Secretary of the Interior to "put down an artesian well or wells at or near Lake Andes, on the Yankton Indian Reservation * * * for the purposes of supplying said Indians with water for domestic purposes, for stock, and for irrigation purposes" (Indian Appropriations Act of 1896, ch. 398, 29 Stat. 343; Indian Appropriations Act of 1906, ch. 3504, 34 Stat. 371). It is apparent

from the text of the Acts that their purpose was to provide a source of water for Indian allotments located upland of Lake Andes. Hence, those statutes shed no light on the question of the ownership or use of lands underlying the Lake itself.

Thereafter, in 1922, Congress enacted a statute authorizing the Commissioner of Indian Affairs to construct and maintain a spillway to stabilize the Lake's maximum elevation. Act of Sept. 21, 1922, ch. 358, 42 Stat. 990. The legislative history of this provision shows that its purpose was to prevent the flooding of adjacent farmlands, including lands "held by Indians under Government restrictions," from the rising waters of Lake Andes. See H.R. Rep. 1073, 67th Cong., 2d Sess. (1922). The 1922 Act thus likewise does not suggest that the Tribe retains aboriginal ownership of the bed of Lake Andes.

3. For the foregoing reasons, it is clear that the 1892 Cession Agreement terminated any ownership interest that the Tribe then had in the bed of Lake Andes.[4] Accordingly, even if the Tribe once had an

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[4] The district court found that the United States was precluded by collateral estoppel "from litigating the issues of aboriginal title and the Cession Agreement of 1892" (Pet. App. 15-16). The district court relied upon the judgments entered in two Indian Claims Commission proceedings in which the Yankton Sioux Tribe recovered awards relating to the lands that it had ceded in the 1858 Treaty and the 1892 Cession Agreement (*id.* at 16-17).

Plainly, however, neither of the two Commission judgments barred the United States from challenging the Tribe's ownership of the lakebed in this case. The action regarding lands ceded by the 1858 Treaty, *Yankton Sioux Tribe* v. *United States*, 24 Ind. Cl. Comm. 208 (Docket No. 332-C), aff'd, *Sioux Tribe* v. *United States*, 500 F.2d 458 (Ct. Cl. 1974), was based on a claim for compensation only for lands outside of the exterior boundaries of the reservation established by

interest in the lakebed that survived South Dakota's admission to the Union in 1889, any such interest was promptly extinguished in 1892. Accordingly, the judgment of the court of appeals, which rejects the Tribe's claim of a *present* ownership interest in the lakebed, is clearly correct. The decision below therefore does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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that Treaty. Because Lake Andes was within the reservation boundaries, the lakebed was not at issue in that action. The second Commission judgment, entered in *Yankton Sioux Tribe* v. *United States*, aff'd, *Yankton Sioux Tribe* v. *United States*, 623 F.2d 159 (Ct. Cl. 1980) (Docket No. 332-D), involved a claim seeking compensation for lands ceded under the 1892 Cession Agreement. However, as the Tribe conceded below (Br. 32), it specifically framed its claim so as to *exclude* the bed of Lake Andes. See 623 F.2d at 183; Pet. App. 17. As a result, no question concerning the lakebed was placed in issue in that case. In any event, collateral estoppel would not bar the State from asserting an interest in the lakebed, since the State was not a party to the proceedings before the Indian Claims Commission.

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